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Report to Governor John A. Love on Certain Colorado Water Law Problems

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REPORT TO GOVERNOR JOHN A. LOVE ON CERTAIN COLORADO WATER LAW PROBLEMS*

BY JOHN UNDEM CARLSON**

In a semi-arid state like Colorado, the importance of water and the uses to which it is put loom large. As this resource approaches full utilization, concern that social and environmental values be protected becomes paramount. The resolution of these concerns is complicated by a system of water law rooted in the state constitution. The potentialities for and the difficulties of solution of the resource management problem within Colorado's water law system are highlighted in this article which should provide an impetus toward solution of the problems surrounding this most necessary and somewhat unpredictable resource. Originally a report prepared for Governor John A. Love, this article examines the water law of Colorado as it presently exists, and analyzes this body of law in relation to the state's interest in social and environmental uses. The footnote format has been changed to conform to the Uniform System of Citation, and there have been minor organizational changes in order to conform to Law Journal format; otherwise, the text as within sections is substantially as it appears in the original report.

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INTRODUCTION

THE doctrine of prior appropriation was law in Colorado before statehood and adoption of the constitution in 1876,¹ which, in article XVI, sections 5 and 6, recognized and confirmed prior appropriation as the fundamental water law of the state.² The origin of this system of water law lies in the obvious scarcity of water in the arid West, the belief that natural resources (water, land, minerals) should be placed in private hands to foster growth and development, and the desire to allocate the scarce resources among the builders of the state with sufficient definiteness so that economic investments would be based on a stable footing. The allocation of water in an appropriation doctrine state rests on the fundamental notion of "first in time, first in right"; that is to say, the first person to use water acquires the right to its future use as against later users.

This kind of allocation of resources is not peculiar to water; in the 19th century the public domain of the United States was opened to the populace on very much the same basis. The first person to locate a mining claim could, by performance of certain acts of development of the mineral resources, obtain good title to the claim.³ The first settler to locate on a home-

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¹ Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

² COLO. CONST. art. XVI, §§ 5-7 provide:

Section 5. *Water of streams public property.* The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of

stead site could, by performance of certain acts of development of the virgin prairie, obtain good title to the lands.⁴ The settlement and development of the West were promoted by these policies.

In the early development of prior appropriation law, it was clear that a judicial decree did not create the water right; the right was created by diversion of water and application to beneficial use. The judicial decree was merely evidence of its place within the priority system. Failure to participate in adjudication proceedings rendered the right junior to those who sought decrees.⁵ This recording system for priorities has been held not to affect those water rights perfected prior to the adoption of statutory adjudication procedure.⁶

Determinations of water rights in Colorado were purely judicial matters until the passage of the Water Right Determination and Administration Act of 1969 (hereafter referred to as the "1969 Act").⁷ The 1969 Act added some element of an administrative law approach to determinations of water rights, in that most water matters may now be heard initially by "referees." It remains true, however, that Colorado continues to employ a judicially oriented and judicially derived water law rather than an administrative water law. In this respect Colorado has rejected the administrative permit system long ago

the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Section 6. Diverting unappropriated water — priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Section 7. Right-of-way for ditches, flumes. All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

³ 30 U.S.C. §§ 22 *et seq.* (1970).

⁴ Desert Land Act of 1877, 43 U.S.C. §§ 321-39; Homestead Act, ch. 75, 12 Stat. 392.

⁵ Hardesty Reservoir, Canal & Land Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co., 85 Colo. 555, 277 P. 763 (1929). This result was codified in COLO. REV. STAT. ANN. § 148-21-22 (Supp. 1971).

⁶ Larimer & Weld Reservoir Co. v. Fort Collins Milling & Elevator Co., 60 Colo. 241, 152 P. 1160 (1915).

⁷ COLO. REV. STAT. ANN. §§ 148-21-1 *et seq.* (Supp. 1969, as amended, Supp. 1971).

adopted in the other appropriation states.

Colorado is fast reaching the point where there is little "unappropriated" water left. The lawful demands of all decreed rights plus the demands of conditionally decreed rights and applications for conditional rights may be sufficient to consume the available water in the state.⁸ If this assumption about available water is correct, the legal procedures by which a new water right is created are less significant for the future of Colorado than are the legal procedures by which existing water rights are changed or transferred, and by which existing conditional decrees are made absolute.

As a general principle, the owner of a water right is free to change the place or nature of use thereof, subject only to the condition that the change will not "injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."⁹ We foresee an increasing volume of change of water right applications, for the economic value of a good water supply for municipal, industrial, or real estate development purposes is greater, in purely dollar terms, than the value of decreed water in the hands of irrigators, mutual ditch companies, and the like.

The Review Draft of the National Water Commission¹⁰ adopts the thesis advanced by Dean Frank Trelease¹¹ and Professor Charles Meyers¹² that the legal system should freely expedite market transfers of water rights, including transfers from irrigation uses to municipal uses. Dean Trelease and Professor Meyers subscribe to the view that economic forces work wisely in taking lands from agricultural production and applying water gained thereby to "higher uses" such as providing municipal supplies. This belief that the market place makes the best choice is illustrated by Dean Trelease's view that:

Economic efficiency requires that water be transferred from less productive users to more productive users, from less valuable uses to more valuable uses. . . . Where property rights in a resource are recognized, and sales of such rights by their owners are permitted, the market (or price) system will automatically allocate a resource to its highest-valued use.¹³

⁸ *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, petition for rehearing denied, 295 U.S. 768 (1935).

⁹ COLO. REV. STAT. ANN. § 148-21-21(3) (Supp. 1969).

¹⁰ PROPOSED REPORT OF THE NATIONAL WATER COMMISSION 7-76 to -98 (Review Draft, Nov. 1972) [hereinafter cited as NWC].

¹¹ Trelease & Lee, *Priority and Progress — Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1 (1966).

¹² C. MEYERS, MARKET TRANSFERS OF WATER RIGHTS (National Water Commission Legal Study, 1972).

Meyers (and to an important extent the Review Draft of the National Water Commission adopts a similar position) feels that to resort to non-market criteria in allocating water resources by restraining transfers is unwise:

Two criticisms [of non-market allocations] are fundamental. The first is that when criteria of allocation other than willingness to pay are used, it is very difficult to decide which uses (or users) of a resource would be most productive. To answer administratively such questions as whether a piece of land would be more valuable as a site of an apartment building or of a shopping center is extraordinarily expensive and time consuming. In contrast, the price system produces an unambiguous and usually quite satisfactory answer. The party in whose hands the property will be most productive is the party who values it most highly and is accordingly willing to pay the most for it. . . .

The second fundamental criticism of administrative allocation is that it expands the role of government in society. . . . One of the principal attractions of the market is that it involves a minimum of governmental participation — ordinarily, a little beyond the provisions of a judicial system . . . to decide disputes over property rights.¹³

Thus Professor Meyers urges state legislation making transfers of water rights from one use to another, from one place to another, easier.

We doubt that Meyers' faith in the efficacy of the market is so widely held in Colorado, or for that matter in the United States, as it was in the heyday of *laissez faire* in the late 19th Century. Certainly there are many responsible citizens who deplore the market's choices in the land development area in the past 10 years. And there seems to be a growing sentiment that administrative determinations, while expensive, are a desirable part of any future dispositions of scarce resources such as land, minerals, and water.

Whether the State of Colorado chooses to give the market free rein in disposition of natural resources or chooses to attempt regulation of market transfers, changes in use, etc., is obviously a political, not a legal, question.

This study does not attempt to deal with the merits of the market economy's choices in redistributing water resources in Colorado. Rather, it assumes that the role of government in redistribution of water resources will increase. Accordingly, this study will analyze the principles of Colorado water law as they exist today in light of a heightened state interest in use and dis-

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 5.

position of water rights, and will examine what legal restraints exist which may limit assertion of that greater state interest.

I. ELEMENTS OF APPROPRIATION AND THE NATURE OF THE RIGHT CREATED

The constitution of Colorado in 1876 recognized and adopted the doctrine of priority of right to water by priority of appropriation.¹⁵ The adoption of this system of water law was, to an important degree, a confirmation of a pre-existing body of law. The determination of what elements of the law of prior appropriation are constitutionally ordained is necessary before one can determine what is permissible by way of legislative alteration of our water law.

The constitution contains these key elements of the doctrine of prior appropriation:

1. All waters of natural streams are property of the public and dedicated to the use of the people, subject to appropriation.

2. An appropriation is the right to divert the unclaimed waters of natural streams, and the right to do so is never to be denied.

3. In allocating waters to rival appropriators, priority in time gives the better right.

4. Domestic users are to be "preferred" over agricultural users, and agricultural users are "perferred" over manufacturing users. (This preference has been construed to mean that a preferred user has the right to condemn the vested water rights of others.)

These elements are obviously not self-explanatory. The judicial and legislative processes have given meaning to them in a manner very much like the evolution of English common law. The principles of our water laws are not always traceable to any explicit constitutional principles; however, variation from what now exists has to be tested against the constitutional elements identified above. With this foreword, we proceed to an overview of the existing water law, from which one may then attempt to determine the restrictions on any change in our water law.

A. *Elements of a Water Right*

Acquisition of a *water right*, as opposed to a *court decree* for a water right, does not depend upon compliance with a

¹⁵ Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

statutory procedure such as is required in "permit" states.¹⁶ In theory, a Colorado water right is acquired by performing the physical acts which constitute the appropriation, namely diverting water and applying it to a beneficial use.

It was early apparent that proof of priority of diversion and beneficial use should be recorded in proceedings whereby the respective priorities of rival appropriators could be finally determined. But to require an appropriator to obtain a decree posed a conceptual problem to the framers of our water law. If actual appropriation depended on diversion and beneficial use, then it was thought that the right so acquired could not be destroyed by failure to resort to court proceedings. This problem was eventually glossed over by providing that the priorities awarded in different adjudication proceedings should take precedence according to date of adjudication. A failure to appear and adjudicate one's right rendered the right junior to those who did appear.¹⁷ The nonappearing appropriator suffered a subordination of priority, but his right still existed as a junior right to those adjudicated.

The litigation associated with adjudication of water rights has caused the terms "appropriation," "diversion," and "beneficial use" to become terms of art. An appropriation consists of a diversion and a beneficial use of the water. Without the presence of both elements, there is no perfected appropriation. This definition seems to have been derived from that body of prior appropriation law which predated the constitution. The constitution, in article XVI, section 6, states that the "right to *divert*" waters for "*beneficial uses* shall be never be denied"; this language is the sole constitutional source for elements of an appropriation.

The 1969 Act gives this definition of an appropriation:

"Appropriation" means the diversion of a certain portion of the waters of the state and the application of the same to a beneficial use.¹⁸

What constitutes a diversion has caused the courts some difficulty. Some early decrees made provision for stock watering out of flowing streams, with no requirement that the water be mechanically diverted from the stream.¹⁹ The thirst of the animals gave rise to the diversion. Also, natural overflows in

¹⁶ *Cresson Consol. Gold Mining & Milling Co. v. Whitten*, 139 Colo. 273, 338 P.2d 278 (1959).

¹⁷ *Hardesty Reservoir, Canal & Land Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co.*, 85 Colo. 555, 277 P. 763 (1929).

¹⁸ *COLO. REV. STAT. ANN.* § 148-21-3(6) (Supp. 1969).

¹⁹ *Thomas v. Guiraud*, 6 Colo. 530 (1883).

times of high water — a right to be flooded — have been recognized.²⁰ In *Town of Genoa v. Westfall*,²¹ the supreme court held that “[t]he only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.”²² Unfortunately, this liberal test was not followed in *Colorado River Water Conservation District v. Rocky Mountain Power Co.*²³ There the court held that maintaining a flow of water in a natural stream for sustenance of fish life could not be an appropriation because it did not entail a physical diversion from the stream. This decision has been the principal impediment to protection of wild or scenic rivers from full appropriation in their upper reaches. The necessity of a mechanical impact on the flow of water to constitute a diversion was codified by the 1969 Act:

“Diversion” or “divert” means removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device.²⁴

Beneficial use has not been so firmly and apparently irretrievably defined. The supreme court has stated: “The term ‘beneficial use’ is not defined in the constitution. What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case.”²⁵ The constitution specifically identifies four beneficial uses: domestic, agricultural, manufacturing, and mining.²⁶ The case law has considered other uses as beneficial, including *diversion* of water for propagation of fish,²⁷ watering grass in a city park,²⁸ “municipal” uses,²⁹ generating power,³⁰ and milling.³¹ The 1969 Act adopts a very general definition of beneficial use:

(7) “Beneficial use” is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the diversion is lawfully made and without limiting the generality of the fore-

²⁰ *United States v. Northern Colo. Water Conservancy Dist.*, 449 F.2d 1 (10th Cir. 1971); *Town of Genoa v. Westfall*, 141 Colo. 533, 349 P.2d 370 (1960).

²¹ 141 Colo. 533, 349 P.2d 370 (1960).

²² *Id.* at 547, 349 P.2d at 378.

²³ 158 Colo. 331, 406 P.2d 798 (1965).

²⁴ COLO. REV. STAT. ANN. § 148-21-3(5) (Supp. 1969).

²⁵ *City & County of Denver v. Sheriff*, 105 Colo. 193, 204, 96 P.2d 836, 842 (1939).

²⁶ COLO. CONST. art. XVI, §§ 6, 7.

²⁷ *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

²⁸ *City & County of Denver v. Brown*, 56 Colo. 216, 138 P. 44 (1914).

²⁹ *City & County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939).

³⁰ *Sternberger v. Seaton Mining Co.*, 45 Colo. 401, 102 P. 168 (1909).

³¹ *City of Telluride v. Blair*, 33 Colo. 353, 80 P. 1053 (1905).

going, shall include the impoundment of water for recreational purposes, including fishery or wildlife.³²

In applying what it thought to be Colorado law, a federal court held that the scenic value of a waterfall was not a beneficial use for which a claimant could acquire a water right.³³ As a result another appropriator was entitled to deplete the stream before it reached the waterfall.

Colorado water law is accordingly vulnerable to the criticism of the Review Draft of the National Water Commission, namely, that state law is wrongheaded in its failure to provide recognition and protection for the social values of water. Two specific recommendations of the Review Draft are worth noting:³⁴

1. State property rules relating to water should authorize water rights to be acquired for all social uses, noneconomic as well as economic. In particular, recreation, scenic, esthetic, water quality, fisheries, and similar instream values are kinds of social uses, heretofore neglected, which require protection. As these values, and rights in them, are recognized and protected in natural lakes and streams, their benefits should be clearly mandated for general public use, particularly when they are uniquely suited to such uses.

3. Public rights should be secured through state legislation authorizing administrative withdrawal or public reservation of sufficient unappropriated water needed for minimum stream-flows in order to maintain scenic values, water quality, fishery resources, and the natural stream environment in those water-courses, or parts thereof, that have primary value for these purposes.³⁵

B. *Transmountain Diversions*

The problems associated with implementation of these recommendations in Colorado turn to a large degree on the political and legal tangle involved in transmountain diversions. The use of water in its basin of origin is to a large degree compatible with preservation of the environmental values recommended by the National Water Commission. The location of transmountain diversion works at high elevations on the Western Slope, on the other hand, can disrupt those values. Their

³² COLO. REV. STAT. ANN. § 148-21-3(7) (Supp. 1969). In the celebrated fish case, where failure to make a diversion from the stream was fatal to the appropriation, the Rocky Mountain Power Co. also argued that sustenance of fish life was not a beneficial use. The supreme court did not specifically deal with this point. *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 158 Colo. 136, 406 P.2d 798 (1965).

³³ *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913).

³⁴ This appears to be inconsistent with the National Water Commission's endorsement of the market place as a favored mechanism for reallocating water use.

³⁵ NWC 7-115 to -116.

location has been dictated by economics and practicality. Willingness to accommodate environmental considerations on the part of new transmountain diverters may be expected to grow as water becomes more scarce.

The significant fact about transmountain diversions is that in Colorado general principles of the appropriation doctrine control. The basin of origin has no right to receive the natural flows of those steams.³⁶ The right to appropriate water from one river basin for use in another basin is clear in Colorado. From the earliest reported cases to the present day, the Colorado Supreme Court has upheld an appropriator's right to make use of water without geographical limitation. This result is perfectly consistent with the theory of prior appropriation, for it is a doctrine founded on the right to *remove* waters from a stream. There is no language in the Colorado constitution which implies any restriction that water be used in its basin of origin, and the Colorado Supreme Court has repeatedly and unequivocally upheld the rights of transmountain appropriators. In *Metropolitan Suburban Water Users Association v. Colorado River Water Conservation District*,³⁷ dealing primarily with conditional decrees for water rights to be used in transmountain diversions, the court stated, in response to an argument that the City and County of Denver had no right to make transmountain diversions:

We find nothing in the Constitution which even intimates that waters should be retained for use in the watershed where originating.

The waters here involved are the property of the public, not any segment thereof, nor are they dedicated to any geographical portion of the state.

The right to appropriate water and put the same to beneficial use at any place in the state is no longer open to question.³⁸

The legality of transmountain diversions under the state constitution is therefore settled. What is not settled (because it has never been attempted) is the constitutionality of a legislative prohibition against future transmountain diversions by private appropriators. A leading early case on the absence of any geographical restriction on place of use of water assumes that the legislature is competent to limit diversions to the natural basin of the water.³⁹ However, the language in the

³⁶ *City & County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939); *Thomas v. Guiraud*, 6 Colo. 530 (1883).

³⁷ 148 Colo. 173, 365 P.2d 273 (1961).

³⁸ *Id.* at 202, 365 P.2d at 288-89.

³⁹ *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

Metropolitan Suburban case would seem to foreclose that approach.⁴⁰

We have no doubt that to curtail or prohibit diversions under *existing* transmountain water rights would amount to a "taking" of property under the constitution. Whether the state has the power to condemn these rights is discussed later in this report.

The only existing statutory limitation on transmountain diversions applies to water conservancy districts. The relevant statute is contained in the provisions for formation and operation of water conservancy districts:

However, any works or facilities planned and designed for the exportation of water from the natural basin of the Colorado river and its tributaries in Colorado, by any district created under this article, shall be subject to the provisions of the Colorado river compact and the Boulder Canyon Project Act. Any such works or facilities shall be designed, constructed and operated in such manner that the present appropriations of water, and in addition thereto prospective uses of water for irrigation and other beneficial consumptive use purposes, including consumptive uses for domestic, mining and industrial purposes, within the natural basin of the Colorado river in the state of Colorado, from which water is exported, will not be impaired nor increased in cost at the expense of the water users within the natural basin. The facilities and other means for the accomplishment of said purpose shall be incorporated in, and made a part of any project plans for the exportation of water from said natural basin in Colorado.⁴¹

This provision embodies the principle of "compensatory storage," which in essence requires that any such district constructing a transmountain diversion project must in the course of such development construct storage reservoirs sufficient to provide for reasonably anticipated future needs of the area from which the water is diverted without any increased expense to the users in that area. The purpose of compensatory storage is to protect water users in areas of origin against the threat of damage from transmountain diversions. The principle came into the law as a concession to Western Slope interests at the time the Colorado-Big Thompson project was under consideration in the late 1930's.⁴² The Fryingpan Arkansas project also provides for compensatory storage at Ruedi Reservoir, and for releases by the project to compensate for transmountain diversion rights previously perfected by the Twin Lakes Reser-

⁴⁰ *Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

⁴¹ COLO. REV. STAT. ANN. § 150-5-13 (2) (d) (1963).

⁴² Biese, *Contemporary Storage*, 22 ROCKY MT. L. REV. 453 (1950).

voir and Canal Co. at its Independence Pass diversion works.⁴³

Compensatory storage places an additional burden on conservancy districts contemplating transmountain diversions. The statute does not apply to private appropriators or municipalities. Thus, compensatory storage requirements do not apply to Denver's transmountain diversions.

Even its applicability to conservancy districts is now under attack. Central Colorado Water Conservancy District was recently denied conditional decrees for transmountain diversions because it made no provision for compensatory storage.⁴⁴ We are informed that an appeal from this ruling challenging the constitutionality of this statute is pending.⁴⁵ It is quite possible that the court will not have to decide the case on constitutional grounds, for as a creature of statute, the conservancy district may well be held without capacity to challenge its organic act and the limitations thereby imposed.

Confronted with a legal system which permitted transmountain diversions, Western Slope interests attempted to limit these projects by the terms of various decrees entered. In *City & County of Denver v. Sheriff*⁴⁶ an attempt to limit a Denver transmountain decree to usage only when Denver's Eastern Slope rights were insufficient for its needs was struck down. The supreme court held that "geographical advantage" did not apply to water, and that Denver, as an appropriator, was entitled to a full, unfettered property right for its Western Slope appropriation.

It is worth noting that transmountain water is peculiarly valuable. The special status of water that is imported into a stream system from another stream system was signalled in *Brighton Ditch Co. v. City of Englewood*.⁴⁷ Englewood sought a decree permitting change of point of diversion for certain water rights in the South Platte River, which it had purchased in order to develop a water supply independent of that of Denver. One contention raised in opposition to the change was that if Englewood were permitted to make the change and develop its own water supply, it would no longer need water from Denver, and Denver would consequently need to import less water from

⁴³ H.R. Misc. Doc. No. 130, 87th Cong., 1st Sess. (1959).

⁴⁴ In the Matter of the Application for Water Rights of Central Colorado Water Conservancy District, W-48 (Garfield County District Court, Oct. 26, 1972).

⁴⁵ At the time of this writing a motion for new trial is pending.

⁴⁶ 105 Colo. 193, 96 P.2d 836 (1939).

⁴⁷ 124 Colo. 366, 237 P.2d 116 (1951).

the Western Slope, thereby decreasing the amount of waste and return flow water accruing to the South Platte River from Western Slope sources to the alleged detriment of Eastern Slope appropriators. The supreme court dismissed this contention, stating that "appropriators on a stream have no vested right to a continuance of importation of foreign water which another has brought to the watershed."⁴⁸ This statement reflects the general principle that water which an appropriator brings to a stream from a foreign source, which otherwise would not reach the stream, may be used by that appropriator without regard to the claims of other appropriators on the stream, and that appropriators on a stream do not have any right to the continuance of such imported water.⁴⁹

Attention has recently focused on the rights of a municipality importing water by means of a transmountain diversion to recycle that water or make more than one use of it before discharging any return flow into Eastern Slope streams. In 1969 the following statute was enacted:

Right to reuse of imported water. — Whenever an appropriator has heretofore, or shall hereafter lawfully introduce foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. Nothing in this section shall be construed to impair or diminish any water right which has become vested.⁵⁰

This statute patently approves the concept of multiple use of transmountain water, and in so doing it is consistent with the general law relating to imported or independently developed water.

A recent Colorado Supreme Court case reinforced the effect of this statute, and in fact declared that the right to reuse may exist even independently of the statute. In *City & County of Denver v. Fulton Irrigating Ditch Co.*⁵¹ the primary issue was whether Denver could make more than one use of its imported water and dispose of it in whatever manner it saw fit after such use. The court defined three types of use of water which were in question: re-use (subsequent use of imported water for the same purpose as the original use), successive use (subsequent use for a different purpose), and the right of disposi-

⁴⁸ *Id.* at 377, 237 P.2d at 122.

⁴⁹ See *San Luis Valley Irrigation Dist. v. Prairie Ditch Co. & Rio Grande Drainage Dist.*, 84 Colo. 99, 268 P. 533 (1928); *Ironstone Ditch Co. v. Ashenfelter*, 57 Colo. 31, 140 P. 177 (1914).

⁵⁰ COLO. REV. STAT. ANN. § 148-2-6 (Supp. 1969).

⁵¹ 506 P.2d 144 (Colo. 1972).

tion (the right to sell, lease, exchange, or otherwise dispose of effluent containing foreign water after distribution to the city water system and collection in its sewer system). The court held that all three types of actions were permissible, and that they would be permissible even independent of the 1969 statute. The city's right to take such action, however, was qualified by its obligation to honor existing contractual obligations to the contrary.

In summary, the present law in Colorado is that transmountain diversions may be made, subject only to the general rules of appropriation and, in the case of conservancy districts, to the requirement of compensatory storage. Transmountain water may be used freely by the appropriator, and it may be used more than once by the appropriator unless some act of the appropriator constitutes a surrender of that right to re-use.

The most significant aspect of the law of transmountain diversions is that the right to make such diversions is now regarded as an incident of the prior appropriation system. The reported Colorado cases do not consider the constitutionality of legislative restrictions on transmountain diversions by appropriators. If transmountain diversions were to be limited by statutes generally protecting the basin of origin against all "foreign" appropriators, we would anticipate a strong constitutional challenge, the argument being that an attempt to give geographical advantage conflicts with the dedication of waters of the state to appropriation, and conflicts with the constitutional absolute guarantee of the right to divert unappropriated waters.

The likelihood of the court sustaining these constitutional arguments is very high. If the people of Colorado wish to limit new appropriations for transmountain diversions, the only *certain* method is by appropriate constitutional amendment. A statutory effort alone seems likely to fail.

C. *The Property Right in Water*

Prior appropriation is the law of "first in time, first in right." Article XVI, section 6, of the constitution provides: "Priority of appropriation shall give the better *right* . . ." Accordingly, priority to the use of water has therefore been characterized by the courts as a property right.

Property rights in water consist not alone in the amount of the appropriation, but, also, in the *priority* of the appropriation. It often happens that the chief value of an appropriation consists in its *priority* over other appropriations from the same natural

stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. . . . A priority of right to the use of water being property, is protected by our constitution so that no person can be deprived of it without "due process of law."⁵²

Although the Colorado courts have consistently agreed that a priority to the use of water is a property right, there has been some confusion as to the nature of that right. As property, its owner may sell it, separate and apart from the land, or change the place of use or point of diversion, as long as rights of other appropriators are not injured.⁵³ It is not a mere revocable privilege, and the right to changes in place of use or point of diversion are not dependent on statutes, but are an inherent incident of ownership.⁵⁴ It is often described as a usufructuary interest:

[A]fter appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the *paramount* right to its use, unless forfeited, continues in the appropriator.⁵⁵

The right has been variously characterized as a freehold,⁵⁶ an interest in real estate,⁵⁷ and a property right lacking the dignity of an estate in fee.⁵⁸ When reduced to possession, as when diverted into a ditch or reservoir, water takes on the character of personal property.⁵⁹

The property right in water is specific, referring to a quantity of water, a point of diversion, a specific time period within which it can be used, and often a particular use. A basic limitation on the property right in water is that an appropriator acquires the right to only that quantity of water which he puts

⁵² Nichols v. McIntosh, 19 Colo. 22, 27, 34 P. 278, 280 (1893).

⁵³ Sherwood Irrigation Co. v. Vandewark, 138 Colo. 261, 331 P.2d 810 (1958); Fort Lyon Canal Co. v. Rocky Ford Canal, Reservoir, Land, Loan & Trust Co., 79 Colo. 511, 246 P. 781 (1926); Seven Lakes Reservoir Co. v. New Loveland & Greeley Irrigation & Land Co., 40 Colo. 382, 93 P. 485 (1907); Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 19 P. 836 (1888).

⁵⁴ Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

⁵⁵ Wheeler v. Northern Colo. Irrigation Co., 10 Colo. 582, 587-88, 17 P. 487, 489 (1887) (emphasis added).

⁵⁶ Gutheil Park Inv. Co. v. Town of Montclair, 32 Colo. 420, 76 P. 1050 (1904); Grand Valley Irrigation Co. v. Leshes, 28 Colo. 273, 65 P. 44 (1901); Monte Vista Canal Co. v. Centennial Irrigating Ditch Co., 22 Colo. App. 364, 123 P. 831 (1912).

⁵⁷ West End Irrigation Co. v. Garvey, 117 Colo. 109, 184 P.2d 476 (1947); Talcott v. Martin, 20 Colo. App. 488, 79 P. 973 (1905).

⁵⁸ Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

⁵⁹ Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

to beneficial use. For example, a right to the use of water for irrigation is limited in time and volume by the needs of the land, and the limitation is said to be read into every decree declaring such a right.⁶⁰ When the needs of the land are satisfied, the water must no longer be used by the appropriator, but must be permitted to flow uninterruptedly in the natural channel of the stream.⁶¹ The amount of water which by careful management and use is reasonably required to be applied to any given tract of land in order to assure proper irrigation is frequently referred to as the duty of water.⁶² This is not a hard and fast unit of measurement, but varies according to conditions. This doctrine is clear enough with regard to agricultural users (although it can hardly be said to be rigidly enforced), but the applicability of these concepts to municipal water decrees is not clear. In at least one reported case, the supreme court indicated that municipalities enjoyed special privileges with respect to standards of use.⁶³

Just as a decree is only evidence of an absolute water right, it is quite likely that a conditional decree is only evidence of a conditional water right. This conclusion is certainly implied in *Rocky Mountain Power Co. v. White River Electric Association*,⁶⁴ where a mere applicant for a conditional decree was held to have a vested property right entitling that applicant to contest (and presumably to be protected) in a change of point of diversion proceeding sought by a prior appropriator. The logical extension of this holding is that one who has done sufficient acts entitling him to a conditional decree also has a property right for which he must be compensated if it were destroyed. If a mere applicant has such a property right, then it follows that a decreed conditional right is in an equal position.

D. Conditional Water Rights

Very early Colorado recognized that some planned appropriations would take substantial time to complete, and that to refuse to secure such claims a place in the priority system would militate against the undertaking of desirable projects. Accordingly, the concept of the conditional decree was devel-

⁶⁰ *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 P. 989 (1895).

⁶¹ *Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co.*, 120 Colo. 423, 210 P.2d 982 (1949); *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 P. 989 (1895).

⁶² *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (1962).

⁶³ *City & County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939).
But see *Baker v. City of Pueblo*, 87 Colo. 489, 289 P. 603 (1930).

⁶⁴ 151 Colo. 45, 376 P.2d 158 (1962).

oped.⁶⁵ A claimant who establishes a firm intent to appropriate certain waters and undertakes certain acts in furtherance of his plan is, upon completion of his appropriation, entitled "to relate back" his priority date to the time he launched his project. A conditional decree evidencing this right to relate back can be obtained so that the claimant can make his investment with security. If and when the appropriation is perfected, the holder of the conditional decree may obtain an absolute decree. While the decree is conditional, the claimant must proceed with due diligence in prosecuting his appropriation.

This area of the law has led to considerable litigation and a considerable body of case law. What constitutes the "first step" entitling the claimant to a date to which he may relate back is a question of fact determined by the court in light of all the circumstances.⁶⁶ In *City & County of Denver v. Northern Colorado Water Conservancy District*,⁶⁷ it was held that "the right may relate back to the time when the first open step was taken giving notice of intent to secure it."⁶⁸ The element of intent to appropriate must be accompanied by some physical demonstration of the intent and whether these have accrued is to be determined on an ad hoc basis.⁶⁹ Whether due diligence in perfecting the appropriation has been exercised is also a question of fact; the size and complexity of the project, the extent of the construction season, the availability of materials, labor and equipment, the economic ability of the claimant, and the intervention of outside delaying factors such as wars, strikes, and litigation are all to be considered in making such determination.⁷⁰

E. Preferences

Colorado, like most appropriation states, recognizes a hierarchy of right to use of water. Unlike many other states, however, in Colorado the hierarchy is established by the constitution:

Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming

⁶⁵ *Sieber v. Frank*, 7 Colo. 148, 2 P. 901 (1883).

⁶⁶ *Elk-Rifle Water Co. v. Templeton*, 173 Colo. 438, 484 P.2d 1211 (1971).

⁶⁷ 130 Colo. 375, 276 P.2d 992 (1954).

⁶⁸ *Id.* at 388, 276 P.2d at 999.

⁶⁹ *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 174 Colo. 309, 486 P.2d 438 (1971).

⁷⁰ *Colorado River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 171 Colo. 561, 468 P.2d 853 (1970).

for any other purpose, and those using water for agricultural purposes shall have preference over those using the same for manufacturing purposes.⁷¹

Although the Colorado constitution would on a literal reading appear to grant an absolute preference in water to domestic uses—as, in fact, is the case in some riparian states—the Colorado cases construing this provision have limited the preference to a right to condemn for a superior use upon the payment of just compensation.

This interpretation is a judicial development. The history of this development is significant; accordingly it is traced in some detail.

In *Strickler v. City of Colorado Springs*,⁷² the City of Colorado Springs sought to add to its decreed municipal water supply certain existing irrigation water rights. One of the points raised on appeal was:

To the extent the use made by the city is purely for domestic purposes, has it the right, without compensation, to take waters theretofore appropriated for agricultural purposes?⁷³

Colorado Springs claimed a right to do so by virtue of the constitutional preference. The court appeared to put great stock in the fact that the water rights which Colorado Springs wanted had vested prior to adoption of the constitution, and, this fact “exempted this case” from constitutional preference. Thus, property rights in water which had arisen prior to the state constitution could not be taken *without* compensation. This holding was founded on the fourteenth amendment to the Federal Constitution and upon Sections 3, 15, and 25 of the Colorado constitution’s Bill of Rights.

Although the opinion is based on the inability of an 1876 constitutional provision to affect a pre-1876 right (and hence, one would think, on the assumption that post-1876 rights could be taken for preferential uses *without* compensation), the penultimate paragraph expressly reserves any ruling on such takings of post-1876 rights:

From anything that we have predicted upon the fact that the water-rights desired by the city antedate the adoption of our constitution, we are not to be understood as intimating that, if

⁷¹ COLO. CONST. art. XVI, § 6. This arrangement is quite different from that of Oregon, which has by statute adopted a more sophisticated preference scheme favoring multiple uses over single purpose uses, upstream uses over downstream, and requiring the maintenance of minimum stream flow for the preservation of aquatic life. ORE. REV. STAT. § 536.310 (1971).

⁷² 16 Colo. 61, 26 P. 313 (1891).

⁷³ *Id.* at 66-67, 26 P. at 315.

the contrary had been the fact, the rule requiring compensation to be made when such rights are taken for a higher use would be different. The determination of this question is not involved in this case.⁷⁴

The next preference case, *Armstrong v. Larimer County Ditch Co.*,⁷⁵ was decided shortly after *Strickler*. The Larimer Ditch Co. maintained a ditch for irrigating and domestic purposes, and thereby served approximately 200 families, many of whom depended on the ditch for their sole supply of domestic water. Its priority was a junior one on the Cache La Poudre. The water commissioner ordered the headgate of the Larimer Ditch closed in order that the flow of the stream be available for senior rights. The Larimer Ditch then obtained an order restraining this act and a decree that it was entitled to water sufficient for the domestic needs of those served by it.

On appeal the court was moved by the fact that rights injured by the Larimer Ditch's claim had vested prior to the adoption of the constitution:

The error into which the learned judge seems to have fallen was in regarding these constitutional provisions [article XVI, sections 5, 6] as retrospective, and so far retroactive as to impair, if not destroy, property rights acquired long before its adoption. Such cannot be its construction. It must be construed to be declaratory of, and not destructive of, the rights and powers enjoyed by the people before its adoption.⁷⁶

The court held that section 5 recognized the rights of prior appropriators, and that to allow the Larimer Ditch the decree it sought under section 6 would destroy what had been granted in section 5, and would be contradictory to article II, section 15, which requires compensation for takings of private property.

In *Montrose Canal Co. v. Loutsenhizer Ditch Co.*,⁷⁷ the Montrose Canal claimed, by virtue of the preference system, to have the constitutional right to divert 50 c.f.s. of water regardless of priority for domestic use, and sought to deprive the Loutsenhizer Ditch of its senior decreed irrigation priority. The supreme court disagreed:

[The preference] is not intended . . . to authorize a diversion of water for domestic use from the public streams of the state, by means of large canals, as attempted in this case. The use protected by the constitution is such use as the riparian owner has at common law to take water for himself, his family or his stock, and the like. And if the term "domestic use" is to be given a different or greater meaning than this, then as between such

⁷⁴ *Id.* at 74-75, 26 P. at 318.

⁷⁵ 1 Colo. App. 49, 27 P. 235 (1891).

⁷⁶ *Id.* at 58, 27 P. at 238.

⁷⁷ 23 Colo. 233, 48 P. 532 (1896).

enlarged use and those having prior rights for agricultural and manufacturing purposes, it is subject to that other constitutional provision requiring just compensation to those whose rights are affected thereby.⁷⁸

The court noted that in *Strickler v. Colorado Springs* the preferences were held inapplicable to pre-1876 rights, and that such prior rights were entitled to compensation before there could be a valid taking. The court did expand this holding to include compensation for senior rights acquired since 1876; however, its reasoning was partly based on the notion that communities desiring to invoke the preference would be wasteful in effecting their diversions.

In *Town of Sterling v. Pawnee Ditch Extension Co.*,⁷⁹ the petitioner brought a quiet title suit against the Town of Sterling, and sought to quiet title in certain spring water for domestic and irrigation uses first made by the petitioner in 1898. Sterling contended that it was entitled to the spring waters without compensating the petitioner. It based its defense on the preferences and upon a statute authorizing towns to take water to supply domestic needs of inhabitants, which provided:

[I]f the taking of such water in such quantity shall materially interfere with, or impair, the vested right of any person or persons, or corporation, heretofore acquired, residing upon such creek, gulch, or stream, or doing any milling or manufacturing business thereon, they shall first obtain the consent of such person or persons, or corporation, or acquire the right of domain by condemnation as prescribed by the constitution and laws upon that subject, and make full compensation or satisfaction for all the damages thereby occasioned to such person or persons, or corporation.⁸⁰

The statute became effective July 3, 1877, and Sterling argued that since any rights of the petitioner did not arise until 1898, the petitioner's interest was acquired subject to divestiture to any town, without compensation.

The court held that such an interpretation of the statute would make it "clearly unconstitutional." The preference for domestic use

does not entitle one desiring to use water for domestic purposes . . . to take it from another who has previously appropriated it for some other purpose, without just compensation. . . . That a city or town cannot take water for domestic purposes which has been previously appropriated for some other beneficial purpose,

⁷⁸ *Id.* at 237, 48 P. at 534.

⁷⁹ 42 Colo. 421, 94 P. 339 (1908).

⁸⁰ An Act to amend an Act entitled "Towns and Cities," § 2, [1874] Colo. Sess. Laws 10th Sess. (now COLO. REV. STAT. ANN. § 139-32-1 (78) (Supp. 1969)).

without fully compensating the owner, is so clear that further discussion seems almost unnecessary.⁸¹

With regard to a harder question, that is, the right of Sterling to take water that was already used for domestic purposes, the court's approach was more cautious:

The right of a city to divert water for the use of its inhabitants is not superior to the right of an individual, or a farming community, to divert water for domestic or other purposes, in the sense that the city make take water for that purpose from those who have previously appropriated it for the same, or some other, beneficial use, without compensating the senior appropriators.⁸²

The import of this dictum is that a city or town can take an individual's domestic water supply if the city or town were willing to pay compensation and proceed by eminent domain.

*Black v. Taylor*⁸³ is the last significant case in which the preference is considered. The supreme court there stated:

Some basis for confusion of thought may be found in the opinion of this court in *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 Pac. 532, in which the court said, with reference to the domestic use of water: "The use protected by the Constitution is such use as the riparian owner has at common law to take water for himself, his family or his stock, and the like." However, following our opinion in *Town of Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 94 Pac. 339, there can be no doubt concerning the right to appropriate water for domestic purposes and the interpretation to be given the constitutional preference relating to such appropriations. Such water user cannot be preferred over a prior appropriator for irrigation purposes without fully compensating the senior appropriator for the loss sustained by invoking the preference.⁸⁴

A number of hard questions with regard to the preference system have not been confronted by the Colorado courts. Those who have sought additional water have resorted either to development of new appropriations or purchase in the market of existing rights. There are no reported cases in which a water user invoked the constitutional preference in aid of a condemnation action.

It is possible that the preference might also be a protection against condemnation. Since domestic users are preferred, an attempt to condemn an existing domestic right for agricultural or manufacturing purposes might be resisted on the grounds that the constitution shields domestic uses from conversion to a less preferred use. This prospect is startling in that if pushed

⁸¹ *Town of Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 426-27, 94 P. 339, 340-41 (1908) (emphasis added).

⁸² *Id.* at 427, 94 P. at 341.

⁸³ 128 Colo. 449, 264 P.2d 502 (1953).

⁸⁴ *Id.* at 457, 264 P.2d at 506.

to this extreme conclusion, the preference would limit the state's acquisition of water rights by condemnation if the state's purpose were not a preferred (domestic or agricultural) one. Thus, there is a possible conflict between the sovereign power of eminent domain over private property, and a constitutionally protected use for a certain kind of property.

As a general matter, the power of eminent domain is the inherent authority of a nation or sovereign state to take, or authorize the taking of, private property for public use without the owner's consent. This power is inherent in the State of Colorado as an attribute of its sovereignty, and the Colorado constitution, article II, section 15, has been construed as limiting a pre-existing power.⁸⁵ The State of Colorado is also limited in the exercise of its eminent domain powers by the due process requirements of the Federal Constitution.⁸⁶

Other than by constitutional or statutory grant of the power, no lesser entity of government has the power of eminent domain. Thus, a municipality has no inherent right of condemnation.⁸⁷ The grant of the right must be clearly expressed or necessarily implied.⁸⁸

The Colorado constitution makes several specific grants of the eminent domain power. For example, article XVI, section 7 grants all persons and corporations the right to condemn a right-of-way across public, private, or corporate lands for construction of ditches, canals, and flumes for conveying water for domestic, irrigation, mining, manufacturing, and drainage purposes. This grant is self-executing in that it does not depend upon any statutory enactment for implementation.⁸⁹ The availability of the grant to private persons is confirmed in article II, section 14:

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.⁹⁰

Article XX, the home rule amendment for cities and towns,

⁸⁵ *Colacino v. People*, 80 Colo. 417, 252 P. 350 (1927).

⁸⁶ *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613 (1935).

⁸⁷ *Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952).

⁸⁸ *Potashnik v. Public Serv. Co.*, 126 Colo. 98, 247 P.2d 137 (1952).

⁸⁹ *Town of Lyons v. City of Longmont*, 54 Colo. 112, 129 P. 198 (1913).

⁹⁰ COLO. CONST. art. III, § 14. The United States does not consider its property subject to this Colorado grant of eminent domain powers. Users of United States' lands uniformly obtain special use permits

also delegates to entities organized thereunder full power to exercise eminent domain to attain any lawful public, local, or municipal purpose. This grant is to some degree limited to the attainment of local purposes, and may be superseded by the legislature when the concern or purpose becomes of statewide, and not merely local, interest.⁹¹

Case law indicates that the preference system is only a grant to preferred users of a right to exercise the power of eminent domain. What has been expressly decided is that the preference cannot be invoked to divest other rights without payment of compensation. No reported case involves a condemnation of a water right with payment of compensation tendered. Accordingly, the precise operation of the preference system is an unknown. The resolution of this problem probably only becomes necessary if the State of Colorado should determine to attempt condemnation proceedings against preferred rights. If the state's goals can be constitutionally achieved without condemnation, then the precise workings of the preference system can await future determination.

F. *Changes in Water Rights*

The increasing demand for water and the scarcity of further "unappropriated" waters point to increasing market pressure on existing decreed rights. Sales and conversions of senior agricultural rights to uses the market now prefers are likely to multiply. Colorado law accommodates this process in statutory proceedings known, since passage of the 1969 Act, as "changes in water rights." Prior to the 1969 Act, a similar result was obtained by "change in point of diversion" proceedings.⁹²

As a general proposition, the owner of a water right is free to exercise it just as the owner of a fee interest in land may put it to the use he chooses. However, Colorado water law very early in its history developed a significant limitation on changes in use of water rights that had no precise equivalent in use of

and rights-of-way pursuant to federal law. It is worthy of note that the United States appears to be showing more reluctance to grant these special use permits when environmental damage is alleged. In the case of new transmountain diversions, a major hurdle is obtaining the right to traverse forest lands. A condition that the Forest Service apparently intends to attach to future permits is the requirement of release of sufficient stream flows to sustain forest values below the diversion. Whether the Forest Service will be successful in this new approach remains to be seen.

⁹¹ *City & County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958); *People v. Graham*, 107 Colo. 202, 110 P.2d 256 (1941); *People ex rel Carlson v. City Council*, 60 Colo. 370, 153 P. 690 (1915).

⁹² *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

land.⁹³ This limitation is that no change in a water right is to be permitted if the change will injuriously affect the rights of other appropriators on the stream.⁹⁴

Decrees for water rights as a general matter specify particular uses, such as irrigation, for the water right. Also, it is a recognized principle that a water right is limited by its historic use pattern.⁹⁵ Accordingly, a water right owner is from the outset limited in his nature of use by his decree and past practices.

In making all changes the subject of "change of water right" proceedings under the 1969 Act, the legislature in large part adopted and codified the existing case law of changes in point of diversion.

The United States Constitution contains no specific reference to water rights; however, the basic protections of property afforded by the Constitution are applicable to water rights. This Federal Constitutional protection derives from the fifth and fourteenth amendments which assure that there shall be no taking of private property without compensation and due process of law.

The Colorado constitution does of course deal specifically with water rights, but it makes no reference to changes in water rights. Accordingly, the origin of the right to change a water right was not pinned to any constitutional provision; rather, the right to change was treated as an incident of ownership of property.⁹⁶

The 1969 Act is the present statute providing the mechanisms for legal recognition of changes of water rights. It defines changes of water rights very broadly:

"Change of water right" means a change in the type, place, or time of use, a change in the point or points of diversion, a change from a fixed point or points of diversion to alternate or supple-

⁹³ Land owners are limited by nuisance laws and these are perhaps the nearest equivalent.

⁹⁴ *Ackerman v. City of Walsenburg*, 171 Colo. 304, 467 P.2d 267 (1970); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 272 P.2d 629 (1954); *City of Colorado Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952); *Brighton Ditch Co. v. City of Englewood*, 124 Colo. 366, 237 P.2d 116 (1951); *Hassler v. Fountain Mut. Irrigation Co.*, 93 Colo. 246, 26 P.2d 102 (1933); *City & County of Denver v. Colorado Land & Livestock Co.*, 86 Colo. 191, 279 P. 46 (1929); *New Cache La Poudre Irrigating Co. v. Water Supply & Storage Co.*, 49 Colo. 1, 111 P. 610 (1910); *Diez v. Hartbauer*, 46 Colo. 599, 105 P. 868 (1909); *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.*, 25 Colo. 161, 53 P. 331 (1898); *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 P. 313 (1891).

⁹⁵ *City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52 (1968).

⁹⁶ *Lower Latham Ditch Co. v. Bijou Irrigation Co.*, 41 Colo. 212, 93 P. 483 (1907).

mental points of diversion, a change from alternate or supplemental points of diversion to a fixed point or points of diversion, a change in the means of diversion, a change in the place or places of storage, a change from direct application to storage and subsequent application, a change from storage and subsequent application to direct application, a change from a fixed place or places of storage to alternate places of storage, a change from alternate places of storage to a fixed place or places of storage, or any combination of such changes. The term "change of water right" includes changes of conditional water rights as well as changes of water rights.⁹⁷

The statute contemplates that any person desiring such change of water right shall seek judicial approval. A change is to be allowed if it "will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."⁹⁸ If a proposed change would cause such injury, and certain conditions may be imposed on the change which would prevent such injury, the change is to be permitted subject to those conditions.⁹⁹ The statute adopts the guidelines of prior case law in giving examples of appropriate conditions: limitations on the use of the water right, relinquishment of part of the decree to compensate other protesting appropriators, time limitations on the proposed diversion, and any other conditions that "may be necessary to protect the vested rights of others."¹⁰⁰ Any party to a proceeding in which a change is sought is to have the opportunity to present conditions which may alleviate such injury.

The 1969 Act reflects what has been the law of Colorado for many years, namely, that the holder of a water right may change his exercise of that right, but only to the extent that no other appropriator, junior or senior, suffers any adverse effect on his vested rights. This constitutes a very significant limitation on the exercise of a water right as a property right.

The statutory rule has its origins in the case law's recognition of a water right as a property right. Once the analogy to a property right in land is made, it logically follows that the owner can exercise dominion by making changes in the uses to which he put his property. Thus, in *Brighton Ditch Co. v. City of Englewood*,¹⁰¹ the supreme court stated that the right to change the place of use and point of diversion of a water right "is an inherent property right, not conferred by our remedial

⁹⁷ COLO. REV. STAT. ANN. § 148-21-3(11) (Supp. 1969).

⁹⁸ COLO. REV. STAT. ANN. § 148-21-21(3) (Supp. 1969).

⁹⁹ COLO. REV. STAT. ANN. § 148-21-21(3), (4) (Supp. 1969).

¹⁰⁰ COLO. REV. STAT. ANN. § 148-21-21(4) (Supp. 1969).

¹⁰¹ 124 Colo. 366, 237 P.2d 116 (1951).

statute, but pre-existing as an incident of ownership, and always enforceable so long as the vested rights of others are not injuriously affected."¹⁰²

If the only change is a change in ownership, there is no limitation on that right to transfer, and there is no requirement of approval from the water court.¹⁰³ Conveyance of water separate from the land, however, almost invariably is accompanied by some type of change in use, either in the purpose for which the water is used, the place at which the water is used, or the point at which the water is diverted. Those changes are strictly limited to protect the rights of *all other* (junior and senior) appropriators on the particular stream system.

The salient fact regarding changes in water rights under existing law is that all restrictions on changes are designed to protect other private water rights owners from injury. Research does not disclose one case where changes were restricted or denied in order to accommodate the proprietary interest of the "public" or the "people" in water. The litigation on changes has been purely a property quarrel between private interests, with the express object of protecting vested rights.

Until adoption of the 1969 Act, standing to contest a change in point of diversion was clearly limited to those alleging injury to vested rights. As the court stated in *Brighton Ditch Co. v. City of Englewood*, "No protestant may properly object to change of point of diversion on grounds that others than himself would be harmed thereby."¹⁰⁴ That result was consistent with the then governing statute on changes in point of diversion.¹⁰⁵ As is discussed elsewhere in this article, the 1969 Act may have liberalized this rule on standing, for it permits "any person" to file a statement of opposition, and "any person interested" to participate in a trial on the matter before the water court.¹⁰⁶

II. WHAT IS THE STATE OF COLORADO'S INTEREST IN WATER

The language of the Colorado constitution¹⁰⁷ purports to

¹⁰² *Id.* at 372-73, 237 P.2d at 120.

¹⁰³ As a consequence, the State Engineer has no accurate information on who owns what water rights.

¹⁰⁴ 124 Colo. 366, 372, 237 P.2d 116, 120 (1951).

¹⁰⁵ Law of April 19, 1943, ch. 190, § 24, [1943] Colo. Sess. Laws 630, *repealed*, COLO. REV. STAT. ANN. § 148-9 (Supp. 1969).

¹⁰⁶ COLO. REV. STAT. ANN. § 148-21-18(1) (a) (Supp. 1971), *amending* COLO. REV. STAT. ANN. § 148-21-18(1) (Supp. 1969).

¹⁰⁷ The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided. COLO. CONST. art. XVI, § 5.

give the public a property interest in the waters of the state. Although the precise language might be read to mean that the waters appropriated prior to the adoption of the constitution are excluded from whatever property right the public has, it is now generally thought that all waters are subject to the public right.¹⁰⁸ However, by making waters which are property of the public subject to appropriation, Colorado authorized the subsequent creation of private property rights in those waters.¹⁰⁹ The nature of the private property right created has been discussed above. In short, the legal theory is that the "people" or the "public" own the waters, and that an appropriator owns a priority to use of water.¹¹⁰ This usufructuary right in the appropriator is a property right which can be taken or damaged only upon payment of compensation. Colorado case law has concerned itself with creation and protection of private rights and paid little heed to the public right. There is the distinct possibility that the property rights (in any traditional sense) remaining in the public by reason of ownership of the waters of the state are not extensive.

Other appropriation states have not relegated the public property interest in water to so insubstantial a position. In permit states, the state engineer is often authorized to refuse to grant permits for water use if he determines the application is not in the public interest. Utah has considered authorizing its governor to withdraw from further appropriation waters flowing in segments of designated streams.¹¹¹ This state power is presumably based on the public's property interest in water. Mr. Edward Clyde, in a legal study for the National Water Commission, notes:

While private rights can be acquired to use water, and while these rights are property interests which are entitled to protection and cannot be taken without due process and payment of just compensation, it is fundamental that the state has an interest in the use of the water resource which justifies regulation to govern the manner in which the resource shall be used. The concept that the state has a dominant interest in the use of the water resource by private individuals has been a part of the law of the West from the very beginning. . . . In short, the

¹⁰⁸ *Kuiper v. Well Owners Conservation Ass'n*, 490 P.2d 268 (Colo. 1971); *Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (1968). The Declaration of Policy to the 1969 Act does not limit the public's property right to waters unappropriated at the time of adoption of the constitution; rather, "all" waters "have always been and are hereby declared to be the property of the public . . ." COLO. REV. STAT. ANN. § 148-21-2(1) (Supp. 1969).

¹⁰⁹ *Fort Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 P. 1032 (1892).

¹¹⁰ *Wheeler v. Northern Colo. Irrigation Co.*, 10 Colo. 582, 17 P. 487 (1887).

vital public concern in a wise and judicious use of the water resource justifies and requires state regulation.¹¹²

The Colorado constitution and cases decided thereunder pose a number of obstacles in the path of a full implementation of the Clyde thesis to Colorado water law. The early cases show an inclination to regard a perfected appropriation in water as the right to defeat the public's property right:

By such appropriation and by reason of the diversion and separation of the water from the volume of the stream the title of the public or people was divested and the appropriator became the owner.¹¹³

This language is properly limitable to a holding that water itself is unsusceptible to private ownership until diverted from the stream, and before such diversion, the appropriator owns only a right to divert. This traditional recitation does not, however, solve the problem, for if the right to divert is in private hands, how can the state retain a right to stop future diversions? A partial answer to this question is that the state has the undoubted power to halt wasteful or nonbeneficial uses.¹¹⁴

Although very distinguished jurists¹¹⁵ long ago called for treatment of water as a public asset not subject to private ownership, Colorado to this day sanctions and encourages the creation of private property rights to use of water. The constitution guarantees the right to divert unappropriated waters. The enunciated public policy of the state serves this end, for the Declaration of Policy to the 1969 Act states:

It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, *subject to appropriation and use in accordance with law*. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state.¹¹⁶

There appear to be significant limits on the extent of the public right in water. To assert at this date that the State of

¹¹¹ E. CLYDE, ADMINISTRATIVE ALLOCATION OF WATER 49 (National Water Commission Legal Study, 1972).

¹¹² *Id.* at 31-33.

¹¹³ *Wyatt v. Larimer & Weld Irrigation Co.*, 1 Colo. App. 480, 497, 29 P. 906, 911 (1892).

¹¹⁴ COLO. REV. STAT. ANN. § 148-21-35 (Supp. 1969), *as amended*, COLO. REV. STAT. ANN. § 148-21-35(7) (Supp. 1971).

¹¹⁵ Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 234 (1914).

¹¹⁶ COLO. REV. STAT. ANN. § 148-21-2(1) (Supp. 1969) (emphasis added).

Colorado retains an overriding property right in waters previously appropriated by private persons, which overriding right would authorize the state to destroy the interests of private appropriators, appears untenable for two reasons. First, the established law in Colorado clearly recognizes the property aspect of a water right; hence, it is not likely that the courts would at this date sanction any new theory drastically expanding the nature and extent of the public's *property* rights at the expense of private water rights previously created (vested rights). Second, (although this is really not a legal observation) it is doubted that the best interests of our society are served if the State of Colorado, having acquiesced in the creation of private property rights for 96 years, now attempts to advance a "public" property right at the expense of citizens who acted, presumably in good faith, and certainly with no indication of state opposition, in acquiring private rights during that period. It should be noted that the United States feels no such nice compunctions about asserting for itself ancient property rights in water, unknown until legal theories invented only nine years ago in *Arizona v. California*.¹¹⁷ Nevertheless, it is felt that the example of the United States is unworthy of a sovereign, and one should agree with the Review Draft of National Water Commission that if the sovereign chooses to take, for its own use, water rights previously acquired under state law, it should do so by condemnation, and pay value therefor.¹¹⁸

This is not to say the public's property right to waters is best buried for all time. Not all regulation by the state is confiscatory of private property. The public property right and the State of Colorado's unquestioned "police" power under the Federal and state Constitutions are authority for the proposition that private water rights are subject to state regulation and administration which are consistent with the constitutional protection of private property and the provisions of article XVI, sections 5 and 6.¹¹⁹ The growth of governmental regulation of property is a history of balancing legitimate state interests with conflicting private property rights.¹²⁰ What is now matter-of-

¹¹⁷ 376 U.S. 340 (1963).

¹¹⁸ NWC 13-5 *et seq.*

¹¹⁹ *West End Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P.2d 476 (1947).

¹²⁰ Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of auto-

factly accepted by way of governmental activity would have outraged lawyers and citizens of earlier eras. Thus far there has been little regulation by government of water rights except to justify curtailment of waste and nonbeneficial uses by private appropriators. That does not mean the power to do more does not exist.

The unique language of the Colorado constitution has great significance in any attempt to define constitutional regulation of appropriations under these powers. Since the constitution flatly states that the "right to divert unappropriated waters *shall never be denied*," any attempt absolutely to prohibit new appropriations, whether by a "moratorium" or a "withdrawal," would undoubtedly face challenge on that constitutional ground. A moratorium with respect to perfection of pending conditional decrees or claims and pending changes in water rights would be challenged as a "taking" without compensation.

The reference to *unappropriated* water has led some persons to suggest that the state might halt all *new* appropriations on the theory that no unappropriated waters remain. This approach does not appear promising for practical and legal reasons. The "new" water rights which could be affected by this tactic are probably not substantial. Existing conditional decrees and pending claims for conditional decrees, if perfected, will probably cause full appropriation of Colorado's streams. But if unappropriated waters are available, then there is a constitutional problem with the guarantee of the right to divert. The case law indicates a literal interpretation of that proviso, for valid appropriations may be created after the flow of a stream is subject to call for prior appropriators.¹²¹ This holding was without benefit of a statute whereby the availability of unappropriated waters was determinable and relevant; however, the reasoning of the case was that in an appropriation state, waters may in the future become available (*e.g.*, when seniors have no need or in a flood), and hence the right to make an appropriation

mobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

¹²¹ Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093 (1909).

thereof could not properly be precluded.

One of the merits often suggested for a "permit" state, such as Wyoming, is the power of the administrative authority to withhold a permit on the ground that no waters are available for appropriation. In conversation with C.J. Kuiper, the State Engineer, Mr. Kuiper noted the anomaly that is now occurring in Colorado: numerous conditional decrees are sought for water rights the priority for which is so junior that in any strict administration of priorities they will never be satisfied.¹²²

The continued creation of "unfillable" conditional decrees is no doubt objectionable to administrators of state waters. In support of the existing system, one can argue that if no water is ever available in fact to fill the claim, no absolute decree will ever issue, for there will have been no diversion and application to beneficial use. But if in fact there are no more unappropriated waters in a given area, then it would appear a waste of judicial effort to attend to the adjudications of these claims when as a practical matter these conditional rights will not be perfected.

With regard to new applications for surface water rights in certain areas (e.g., the Arkansas River Basin), the Division Engineer routinely opposes the award of further decrees on the ground that there is no unappropriated water available to satisfy the decree. It also appears that the courts routinely disallow this objection on the theory that the constitution and the rule in *Humphreys Tunnel & Mining Co. v. Frank*¹²³ afford appropriators the undeniable right to perfect further appropriations, even though the new priorities will be satisfied only in the event of rare flood occasions. However, the approach is quite different with regard to wells, where the State Engineer has statutory authority to deny new permits to construct wells when he finds that exercising the permit would cause injury to other vested rights.¹²⁴ Yet only by diverting (pumping) water out of priority would a new well appear to injure vested rights. This seeming inconsistency between the law on acquiring surface water rights and wells has not faced a constitutional challenge.¹²⁵

¹²² Interview with C.J. Kuiper, Colorado State Engineer, in Denver, Colorado, Oct. 27, 1972.

¹²³ 46 Colo. 524, 105 P. 1093 (1909).

¹²⁴ COLO. REV. STAT. ANN. § 148-18-36(2) (Supp. 1971).

¹²⁵ The Colorado Supreme Court in *Hall v. Kuiper*, 510 P.2d 329 (Colo. 1973) upheld the State Engineer's denial of two well permits even though no adverse effect to any individual vested right was proved; only a general adverse effect to the stream was shown. This case has thus resolved the point against potential ground water appropriators.

Customarily, the State of Colorado has not appeared in water proceedings to assert any interest of the "public" or the "people" in either dispositions of the public waters to private appropriators or changes of water rights. Until the 1969 Act, adjudications of water rights and changes in point of diversion were in practice mere contests between rival claimants for water rights. The Colorado Supreme Court acknowledged that the general public had an interest in the outcome of these adjudication suits, but attempts by litigants to assert those interests of the public were rejected.¹²⁶ Under the rule in *Arkansas Valley Co. v. Hardesty Co.*¹²⁷ one who opposed a water claim was constrained to justify his opposition by an allegation of injury to his own water right.¹²⁸

The relegation of the general public's interest to that of a *silent* observer, unrepresented by counsel, which was to be protected, if at all, by the judge, is probably consistent enough with the traditional underpinnings of the doctrine of appropriation, and the law's traditional hostility to "private attorneys-general." For, if the constitution provides that all water is subject to appropriation by private interests on a first come, first served basis, and if the constitution further provides that the right to divert shall never be denied, then there is little point in making adjudication suits anything other than a struggle amongst rival appropriators. It is only when one lacks confidence that any of the competing users will make the proper use of the water resource that reason to challenge the traditional limitations on "standing" to be heard in water contests arises.

The existing water law of Colorado does not recognize the possibility that appropriators may seek to develop water rights which, although beneficial uses under existing law, are nonetheless socially undesirable for the public at large. If the use is "beneficial" in terms of the applicant's economic needs, that suffices. The water law now assumes that all growth and

¹²⁶ *City & County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939). In this case, Western slope interests urged that by allowing Denver to acquire further Colorado River waters, the vital interests of the people might be jeopardized. The supreme court refused to consider the notion that taking water out of one basin might be contrary to the "people's" interest.

¹²⁷ 85 Colo. 555, 277 P. 763 (1929).

¹²⁸ *Bond v. Twin Lakes Reservoir & Canal Co.*, 496 P.2d 311 (Colo. 1972). The rule stated in the text applies to surface rights. With the holding in *Hall v. Kuiper*, the right to new appropriations has been significantly limited. See note 125 *supra*.

development give rise to "beneficial" uses of water, and in allocating the water, awards the first claimant. Thereafter the free market may cause a shift in uses, but the law is not concerned with the merit or demerit of the choice the market makes.

The Colorado Supreme Court has declared that the term "beneficial use" is not a term defined by the constitution: "What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case."¹²⁹ This reluctance to infuse an absolute meaning or definition to a constitutional term may offer some promise for the state in controlling water uses. If the legislature were to define beneficial uses as those which conform to a state water plan, there is a reasonable prospect of upholding the statute.

The 1969 Act indicates a slight departure from prior law's treatment of water adjudications as squabbles between competing private proprietary interests. While prior law expressly limited the right to cross-examine witnesses and to introduce evidence to *water rights* owners whose *water rights* were affected by the claim at hand,¹³⁰ the 1969 Act provides that "any person" may file a statement of opposition to an application,¹³¹ and the recitation of previous statutes which tied this right to protest to persons who allege injury to their own vested water rights is omitted. At trial of the claim, the 1969 Act also provides that "All persons interested shall be permitted to participate"¹³² The term person is defined by the 1969 Act broadly:

"Person" means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States of America, or any other legal entity, public or private.¹³³

Whether the 1969 Act was designed to expand the class of parties who might contest water claims has not been determined by the Colorado Supreme Court. That question is confronting the referees and the water courts now in various proceedings. In at least one instance a trial court has ruled that

¹²⁹ *City & County of Denver v. Sheriff*, 105 Colo. 193, 204, 96 P.2d 836, 842 (1939).

¹³⁰ See Law of April 19, 1943, ch. 190, § 10, [1943] Colo. Sess. Laws 620, repealed, COLO. REV. STAT. ANN. § 148-9 (Supp. 1969).

¹³¹ COLO. REV. STAT. ANN. § 148-21-18(1) (Supp. 1969), as amended, COLO. REV. STAT. ANN. § 148-21-18(1) (b) (Supp. 1971).

¹³² COLO. REV. STAT. ANN. § 148-21-20(3) (Supp. 1969), as amended, COLO. REV. STAT. ANN. § 148-21-20(3) (Supp. 1971).

¹³³ COLO. REV. STAT. ANN. § 148-21-3(2) (Supp. 1969).

the 1969 Act did expand the class.¹³⁴

If the 1969 Act does expand the class which may oppose water claims, the ultimate issues to be determined by the water court probably remain unchanged from prior laws. The 1969 Act is silent with regard to the grounds on which an opponent might base his objection, and hence does not explicitly expand the grounds of inquiry in disputed water claims. New claims still turn on the claimant's proof of diversion and beneficial use, in terms of priority of use. The 1969 Act does not authorize denial of claims on the ground that the use of the water may be inconsistent with state policy on growth or land use, or that the claimant's use is less desirable in social terms than no use at all, or that the use will wreak environmental damage. In the case of changes of water rights, the sole issue specified by statute is still a classic property dispute; namely, will the change cause injury to the owner or person entitled to use other vested water rights?¹³⁵

The 1969 Act also broke new ground by inserting the division engineer into all determinations of water rights proceedings. In the case of applications heard by a referee, the referee must consult with the division engineer and file in the cause a report on the substance of the consultation.¹³⁶ In the case of applications heard by the water judge (which, unlike hearings before the referee, are conducted in the manner of a regular trial) "the division engineer shall appear to furnish pertinent information and may be examined by any party."¹³⁷

What information is "pertinent" is not defined in the 1969 Act. The conclusion is that the division engineer's testimony is probably limited by existing law to issues of less concern to the state than to rival appropriators. For example, a division engineer could support or contradict facts alleged in the cause, of which he had knowledge, and could probably offer expert testimony in certain kinds of cases. In changes in water rights, his records may support testimony as to historic amounts of water available for transfer by the water right in question, and he might be qualified to offer expert testimony on whether an

¹³⁴ Correspondence with Michael D. White, Esq., Master-Referee for the Water Court for Divisions 4, 5 and 6, in United States water claims case pending in the District Court for Garfield County.

¹³⁵ A transfer could also be resisted on the grounds that a proposed use is not a beneficial use. Thus, a transfer for purposes the law does not recognize is assailable.

¹³⁶ COLO. REV. STAT. ANN. § 148-21-18(4) (Supp. 1971), amending COLO. REV. STAT. ANN. § 148-21-18(4) (Supp. 1969).

¹³⁷ COLO. REV. STAT. ANN. § 148-21-20(3) (Supp. 1969), as amended, COLO. REV. STAT. ANN. § 148-21-20(3) (Supp. 1971).

exchange proposal or a plan of augmentation would injuriously affect other vested rights to water. But in none of these proceedings does the division engineer advance any proprietary interest of the State of Colorado in the use or disposition of public waters. His opinion on the claim as a wise and judicious use is relevant only in the context of traditional notions of waste or actual beneficial use, and his role seems to be that of an aide to the court in determining the truth of the matters asserted.

Under present law there is a very good possibility that the attorney-general could make an appearance on behalf of the State of Colorado, and participate in water determination hearings. If he were directed to do so by statute, the likelihood of overcoming challenges to "standing" would be greater, for any challenge would then be directed to the constitutionality of the statute. It appears the state's property right and the police power are sources of constitutional power on which to base this state activity.¹³⁸

However, unless the scope of inquiry in water matters is much enlarged so as to put before the court the basic issues occasioning state interest, there is only a limited gain to be had from state participation. The limited gain is that by policing all claims, the state would keep claimants honest. No doubt there is a need for some entity to shoulder this burden, for the adversary system we have now depends upon an opponent with financial wherewithal, but this approach does not deal directly with the desirability in social terms of future water uses.

The state could choose to appear and attempt to assert in pending applications for new water rights or in change cases that a proposed use is nonbeneficial because of the adverse impact the new use or transfer would have on public interests. A court would be more likely to depart from traditional notions of beneficial use and give consideration to this state assertion if there were a statutory expression that the scope of inquiry was to be widened.

III. OBSERVATIONS

A. *Impetus to Consumptive Water Uses*

The doctrine of prior appropriation as we know it in Colorado contemplates the full use and consumption of all the water in the state. The usages that are favored are traditional applica-

¹³⁸ See *West End Irrigation Co. v. Garvey*, 117 Colo. 109, 184 P.2d 476 (1947).

tions of water in furtherance of economic development: more industry; more farming; more human consumption. Full consumptive use of all Colorado waters may serve goals of economic development at the expense of what are referred to as noneconomic values, that is, scenic, aesthetic, and environmental values.

There are external pressures promoting full usage of water, especially with regard to the Colorado River. The assumption is widespread that failure to make immediate full use of Colorado's share of Colorado River water will constitute a waiver of the right to increase consumptive uses in Colorado at a future date. This argument deserves thorough investigation and analysis.¹³⁹

B. *Recognition of Social and Environmental Water Values*

The present Colorado water law does not afford protection for non-economic values. By virtue of express constitutional provision all water is available for appropriation by diversion to beneficial uses. The Colorado Supreme Court has refused to permit an "appropriation" for an in-stream fishery on the grounds that it did not involve a diversion.¹⁴⁰ This decision probably bars any "appropriation" to protect in-stream, non-economic values.

The water law should be flexible enough to accommodate the noneconomic values which the public may hold. The Review Draft of the National Water Commission recommends five legislative actions by states such as Colorado:

- (1) reserving portions of streams from development and setting them aside as "wild rivers;"
- (2) authorizing a public agency to file for and acquire rights in unappropriated water;
- (3) setting minimum stream flows and lake levels;
- (4) establishing environmental criteria for the granting of permits to use water;
- (5) forbidding the alteration of watercourses without State consent.¹⁴¹

Accommodation of these five goals in Colorado is difficult under our constitution and decided cases. The first point, reservation of waters from development, runs directly counter

¹³⁹ The experience of the San Luis Valley would indicate that some established economies are displaced by compact obligations. Texas and New Mexico appear to have successfully held Colorado to that amount of water awarded in the Rio Grande compact.

¹⁴⁰ *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 158 Colo. 331, 335, 406 P.2d 298, 300 (1965).

¹⁴¹ NWC 7-4.

to the language of article XVI, section 6, that the right to divert unappropriated waters shall never be denied.

The second point is the technique that was attempted and failed in *Colorado River Water Conservation District v. Rocky Mountain Power Co.*¹⁴² The Conservation District, pursuant to statutory authorization, sought to make an appropriation for in-stream values. The supreme court said that there could be no appropriation without actual diversion from the stream. Presumably the court did not mean to strike down impoundments of in-stream reservoirs. Whether the proposed use qualified as a "beneficial use" is unclear in the decision. This case does present a formidable obstacle to a statutory accommodation of "noneconomic" in-stream values. It is possible, of course, that, confronted with a statute defining diversions to permit in-stream flows, and defining beneficial uses to include in-stream fisheries or other environmental considerations, the court would reverse or distinguish away prior case law. This is a matter of conjecture. A surer remedy is a constitutional amendment. The utility of such a statute or amendment, in a practical sense, will depend on the availability of "unappropriated" waters in fact.

The third point, establishing minimum stream flows, also appears to run contrary to the constitutional right to divert unappropriated waters. If that proviso cannot be circumvented by making an appropriation for in-stream values, then it would seem that a constitutional amendment is indeed necessary.

The fourth point, establishing environmental criteria in awarding a water right, would seem to hold favorable possibilities. All water is subject to appropriation for beneficial use. The supreme court has held that "beneficial use" is not defined in the constitution, and is a question of fact.¹⁴³ A statutory definition of beneficial use which required consideration of environmental impact before according the diversion the status of a beneficial use might well withstand the inevitable legal assault.

The fifth point, forbidding alteration of watercourses, was once law in Colorado. The previous statute was not even honored in its breach, and was replaced in 1969.¹⁴⁴ Presumably this

¹⁴² 158 Colo. 331, 406 P.2d 798 (1965).

¹⁴³ *City & County of Denver v. Sheriff*, 105 Colo. 193, 204, 96 P.2d 836, 842 (1939).

¹⁴⁴ No person owning or controlling any reservoir, lake or body of water into which public waters flow and which furnishes the water supply in whole or in part to any stream containing fish, shall divert or lessen such water inflow or supply to an

statute could not halt water diversions pursuant to the constitution.

C. *Prospects for State Impact on Future Water Uses*

1. An overview

The State of Colorado is not, under present law, charged with advancing or protecting the public interest in the applications for water rights or for changes of water rights. Under existing law, litigants in water matters advance private proprietary interests. If the General Assembly were by statute to assert that water rights should not be granted or changed unless the result was consistent with the public interest, and charge an appropriate state agency with advancing or protecting that interest in water proceedings, challenges to its constitutionality would undoubtedly be made.

Conceivably, the state might now choose to designate an agency with legal staff to participate in all water determinations to assure that all water rights applications do in fact meet existing legal criteria. The 1969 Act permits "any person" to file protests to claims, and permits "any person interested" to participate in a hearing before the water court.¹⁴⁵ The "interest" requisite for Colorado participation could be said to arise from its proprietary interest in public waters. There is a good chance that the courts would afford the state "standing" under existing law.

The utility of this approach is limited, although the state would be a litigant, for the fundamental questions giving rise to the state participation would continue to be beyond the scope of the water court's inquiry. For example, it is of no moment under present water law whether the award of a water right or a change of a water right is consistent with a state water plan or a state land use plan. Likewise, the water court is not concerned with the social and environmental impact of a claim for a water right or a change of a water right. Further, the fact that the proposed uses by rival applicants for the same water have varying degrees of benefit to the state at large is irrelevant.

extent detrimental to the fish in such stream, reservoir, lake or body of water.

Law of April 27, 1899, ch. 98, § 13, [1899] Colo. Sess. Laws 198. This statute was codified as COLO. REV. STAT. ANN. § 62-9-16 (1963). In 1969, however, Chapter 62 was repealed and re-enacted, and this section was entirely deleted. Law of July 1, 1969, ch. 157, § 1, [1969] Colo. Sess. Laws 430.

¹⁴⁵ COLO. REV. STAT. ANN. §§ 148-21-18(1), 148-21-20(2), 148-21-20(3) (Supp. 1969), as amended, COLO. REV. STAT. ANN. §§ 148-21-18(1)(b), 148-21-20(2), (3) (Supp. 1971).

The constitution, as interpreted to date, does not allow direct choices to be made between competing applicants on the basis of merit; it awards new rights on a first-in-time basis. In the case of changes in water rights, Colorado law denies changes only if other appropriators are injured. This right to a change is an aspect of the constitutionally protected property right.

An attempt to insert into determinations of new water rights state concern over the kinds of questions (now ignored) discussed above would face intense political and legal challenges. The probable legal arguments against such a course of action would be:

- a. That it would violate the constitutional provision guaranteeing the right to divert waters.

- b. To the extent that it favored a junior claimant to the right over a senior claimant on the ground that his use was of greater benefit to society, it would violate the constitutional provision that "priority of appropriation shall give the better right as between those using the water for the same purpose."

It is settled law that this proviso means priority of appropriation gives the better right as between all users, with certain "preferred" users having the right to satisfy their needs by condemnation of nonpreferred rights. Accordingly, there is little point in attempting to allow the courts to choose between applicants on "merit."

In order to overcome the legal arguments of unconstitutionality, one would have to envisage a Colorado Supreme Court willing to forsake a generally accepted interpretation of article XVI, sections 5 and 6 and to reassert the public's concern with disposition of its waters. Courts do depart from yesterday's standard interpretations; whether they would do so here is conjectural. To sustain before the supreme court departures from generally accepted tenets of the law of prior appropriation is a substantial burden indeed, but perhaps there has never been so favorable a climate in which to raise these questions. As a matter of logic, there is no compelling reason to conclude that the State Legislature is powerless to define "beneficial uses," "appropriations," and "diversions" in new appropriations to accord with the felt necessities of today.

The assertion of a state interest in changes of water rights would also face legal and political challenges similar to those outlined above. Additionally, it will be argued that to restrict changes in furtherance of a state interest would represent an

unwarranted and unneeded state interference in the affairs of the citizenry and in the optimum working of a free market economy. This is not a legal argument. The inclination of the state to play a larger role in the ordering of our society is pronounced, and the decision is properly a political one to be made by the people and their elected representatives. Also, it would probably be argued that to restrict changes in water rights to conform with a state interest in land and water use would constitute a "taking" for which compensation must be paid.

There is a good chance to uphold a statute whereby a change in water right might be made to depend upon a finding by the water court or other authority that the change was in accord with a state policy on land and water use. The success of this approach would probably depend in great measure upon the specificity with which the state interest was spelled out. In a sense this argument turns on the proposition that a use is not beneficial when it contravenes enunciated state policy. This conclusion is based on the fact that changes in water rights are now said by the court to be an "inherent" property right. The "inherent" right to change the use of other kinds of property (e.g., land) has been limited by exercise of the police power.

Other jurisdictions seem to control development, growth, and density through more traditional land controls. One obvious merit of the traditional land approach is its lack of novelty. However, as a conceptual matter, imposing state controls on water transfers seems no more revolutionary than land controls were 50 years ago. (It should be noted that land controls have not always enjoyed immediate acceptance from the courts.)

2. Conditional Decrees

The claims for water rights that have recently generated substantial public controversy are conditionally decreed water rights, or claims for conditional decrees now pending in proceedings before the water courts. Many people feel that perfection of all claims and conditional decrees will truly cause all Colorado waters to be fully appropriated. The projects for many conditionally decreed rights will probably never be built, and hence some "unappropriated" waters will be available for other uses. The entities with economic power sufficient to build the projects are municipalities. Reclamation projects for agriculture do not have a healthy appearance.

Conditionally decreed water rights have been called "in-

choate" interests by the courts,¹⁴⁶ but they are nevertheless property rights. If the owner fails to proceed with reasonable diligence to perfect the conditional right, it can be cancelled by the court and the holder suffers a loss of his priority.¹⁴⁷ What constitutes reasonable diligence in a particular case is a question of fact — a question that has given rise to a large body of litigation.¹⁴⁸ There is no precise period in which a conditionally decreed project must be completed; the courts have repeatedly acknowledged that the time required may vary according to the magnitude of the project, the economic resources of the applicant and the economic conditions prevailing in the society.¹⁴⁹ If an applicant is making a bona fide attempt to complete his project there is little likelihood that the conditional decree will be cancelled.

Because of the ease with which conditional decrees may be kept alive for many years, it has occasionally been suggested that some fixed period of years be established in which a conditional decree be perfected or suffer cancellation. In 1969 the general assembly was urged to place a 5-year (prospective) limit on completion of all conditional decrees; failure to meet the limit was to cause cancellation of the priority. This proposal is widely unpopular with major water developers. The Board of Water Commissioners of the City and County of Denver does not wish to be forced immediately to construct projects, which, in any reasonable planning scheme, will not be needed until 1990. Quasi-municipal districts, such as the Southeastern Colorado Water Conservancy District and perhaps also the Colorado River Water Conservation District¹⁵⁰ hold conditional decrees for water rights which will not be perfected to absolute decrees until Congress appropriates sufficient funds to construct the projects. The struggle to authorize these projects and the investments made to date in reliance on various conditional decrees are, in

¹⁴⁶ *Conley v. Dyer*, 43 Colo. 22, 28, 95 P. 304, 306 (1908).

¹⁴⁷ COLO. REV. STAT. ANN. § 148-21-17(5) (Supp. 1969).

¹⁴⁸ *Colorado River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 171 Colo. 561, 468 P.2d 853 (1970); *City & County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954).

¹⁴⁹ *Colorado River Water Conservation Dist. v. Twin Lakes Reservoir & Canal Co.*, 171 Colo. 561, 468 P.2d 853 (1970).

¹⁵⁰ The Colorado River Water Conservation District may not object to a fixed time period. Its major projects for which it holds conditional decrees are also the subject of claims by the United States in pending proceedings. The United States is seeking a better priority date than the district obtained, and the United States asserts that federal rights are not subject to loss for failure to show diligence in perfecting the appropriation. Thus, if a federal right is obtained, the district's interests are placed beyond attack by rival Colorado appropriators.

some cases at least, very substantial. The question then arises whether, with such examples in mind, it would be constitutional for the State of Colorado to impose a fixed time period for completion of all conditional decrees.

It is believed that the state has the power to establish a time period in which any new conditional decree, applied for after enactment of the statute, must be completed in order for the claimant to relate his priority date back to the time he launched his claim. The doctrine of "relation back" is nowhere embodied in the Colorado constitution; it is a judicial and legislative creation that is designed, according to our courts, to allow large undertakings to proceed with secure knowledge that the owners' priority position will be protected if they complete their projects. The doctrine of relation back has been held to be "in derogation of the Colorado constitution" and hence to be strictly construed. Accordingly as to new claims (not now decreed or applied for) the Legislature can, if it chooses, either abolish the doctrine or limit it severely by imposition of a fixed time limit for showing diligence.

Altering the test of reasonable diligence with regard to conditional decrees heretofore granted or now applied for in pending proceedings poses more difficult problems. Take the hypothetical case of a conditional decree previously entered, pursuant to which the owner has invested capital and is proceeding with what the law now regards as due diligence even though it may take 15 years to complete the project. A statute which caused the loss of his priority unless he completed the project in 5 years would undoubtedly be challenged by that claimant as a taking, without compensation, of his property right. The courts probably would be sympathetic to such a claim.

In order to sustain such a statute, it would have to be shown that the regulation was reasonable and not arbitrary. To make no provision for extensions of time in cases where a fixed period would work obvious inequities would invite an overturning of the statute.

Cases in which a claim for a conditional decree is pending pose problems as well. Presumably in such cases, a claimant has invested sufficient funds and energy to entitle him to a conditional decree. If the project is large, for which a completion plan reasonably contemplates an extended period of time, an imposition of a shorter, fixed period of time in which the claimant cannot reasonably be expected to complete the project, has the appearance of confiscatory legislation and hence

also a taking for which compensation would be required.

Both conditionally decreed water rights and claims for conditional water rights are property rights under Colorado law. Their value may be less than perfected rights but they are nonetheless property. In *Rocky Mountain Power Co. v. White River Electric Association*¹⁵¹ the supreme court held that a mere claimant to a conditional water right had a "vested right" entitling him to contest a perfected water right owner's petition for a change in point of diversion:

[O]ne who is entitled to a conditional decree defining his rights to water for future application to use has a vested right which he may protect in case of any action by others to destroy or injure that right.¹⁵²

This recognition of a property right in a claimant to a conditional decree would logically extend to a holding that an "unreasonable" or "arbitrary" destruction of that property right by the state might constitute a taking. Determination of what is "arbitrary" is obviously at the root of the problem.

In the case cited, Rocky Mountain Power Co. alleged expenditure of approximately \$700,000 in furtherance of its claim. Rendering such a project impossible of completion by imposition of a short fuse would be to invite the court to strike such a statute down. No doubt there are steps that can be taken to cause courts to impose a firmer standard with respect to diligence; however, an uncompromising legislative attempt to void existing claims and conditional decrees seems unpromising.

Changes in water rights will have an increasing impact on water use for there is a discernible trend for senior agricultural rights to be converted into domestic or municipal rights. Changes of water rights are complex and expensive, and are not permitted when the proposed change will injure other appropriators. The expense and complexity of changes are presently a deterrent to conversions, but with market forces demanding water for development purposes, the costs of transfers are borne more readily.

Transmountain diversions for agricultural purposes are the obvious targets for such changes. It is easier to obtain a change in water rights for foreign water than native water. Other appropriators cannot frustrate changes of foreign water with the ease that is possible in changes of native water.¹⁵³

¹⁵¹ 151 Colo. 45, 52, 376 P.2d 158, 162 (1962).

¹⁵² *Id.* at 53, 376 P.2d at 162.

¹⁵³ A principal private perfected agricultural transmountain right, Twin Lakes Reservoir and Canal Company's Independence Pass transmountain

3. Some limitations on state activity

There are necessarily flaws of omission in attempting to condition changes and new appropriations in conformance with new state standards. First, the new standards would not deal with existing applications for conditional decrees or existing conditional decrees unless at some later date the owners sought a change in water right — a very unlikely event in the case of any right now held for municipal purposes.

Second, it is questionable whether federally funded reclamation projects could be affected by state regulation in reallocations of water rights within project lands. In at least one project, Congress has determined that municipal applicants be preferred in use of project water. The extent to which state law can displace the applicable federal law is questionable.

Third, the preference system in the constitution appears to grant a constitutional right to acquire water for domestic purposes by condemnation. This grant is not limited to any class of domestic user. It would appear that even individuals possess it. If, for example, the state water and land use plans called for preservation of a certain area as green belt, and the state plan was a valid consideration in a transfer proceeding, denial of the change sought by a municipality on the ground that the change would destroy the green belt would appear to frustrate the preference system.

If the preference is an absolute constitutional right to acquire water for a domestic use, then perhaps it deserves repeal. Its rigidity seems undesirable. The general assembly certainly has the authority to confer eminent domain powers on preferred users without this constitutional provision.¹⁵⁴

Perhaps an argument can be made that the preference as well as (prospectively) the right to divert, could be confined by statute to natural persons. The legal merits of such an assertion have not been investigated. It would obviously engender concerted political opposition from municipalities and other corporate appropriators.

D. *Transmountain Diversions and United States Claims for Water Rights*

Transmountain diversions are the practical victim of main-

tain diversion, has already been sold, in part, for conversion to municipal uses.

¹⁵⁴ The statutes and the home rule amendment already award this power. See COLO. CONST. art. XX; COLO. REV. STAT. ANN. §§ 139-32-1(78), 89-5-13(10) (1963).

tenance of scenic rivers and minimum stream flows, for economic and engineering efficiency call for location of the facility at high altitudes. If the need for water is great enough, presumably stream flows can be maintained and water pumped back to the high altitude for transmountain diversions. There has been some indication that the Denver Water Board is examining this alternative. Notions of economic limitations on what a major municipality will pay for water may be out of date. This solution does not satisfy those in the basin of origin whose possibilities for future economic development are thereby limited.

The failure of various western states to accommodate social and environmental values in water is one of the justifications offered by federal officials for the United States' claims to reserved water rights.

The United States is now seeking water rights decrees for itself in two sets of Colorado proceedings. The first is a state water court suit and is a consolidation of claims made in divisions 4, 5, and 6 (roughly, the Gunnison, Colorado, White, Yampa, and North Platte watersheds) as well as several statutory proceedings under pre-1969 Act law. The second is a quiet title proceeding in federal court which the United States has instituted with respect to waters in Water Division 7 (which includes various regions in southwestern Colorado). (This second case has been dismissed on the "abstention theory"; the state courts are more qualified to decide the issue and thus the federal court will abstain.)

The United States' claims (excluding Indian claims) rest on the theory that when certain public lands were withdrawn from public entry and reserved to the United States, the United States also reserved water rights necessary to effect the purposes of the reservation. The United States also claims that certain federal water rights were created where the United States Congress passed laws for the construction of reclamation facilities. Further, the United States claims, with respect to its "reserved" water rights on the national forests, that it is entitled to maintain stream flows at a level adequate to support aquatic life and to protect aesthetic or environmental values. The Indian water claims present unique considerations, and are not treated here.

The claims of the United States have generated considerable opposition from many Colorado appropriators, for the United States seeks a priority date that is senior to a great number of

previously adjudicated Colorado decrees. The rule of Colorado law is that priorities are ranked according to date of adjudication. The United States, however, seeks to obtain its "true" priority date, regardless of this Colorado rule. Some of the major Western Slope water interests see the United States claim as a device to limit transmountain diversions. By and large, the United States claims antedate the transmountain diversions; hence, to the extent the United States calls for water to satisfy its needs, the diversion facilities along the Continental Divide will bear the brunt of the demand. The United States also specifically claims the right to maintain a minimum stream flow in streams located on the national forests. Transmountain diverters, who, in some cases, take the entire flow of a given stream, regard this claim as a substantial threat to their historic water yield. The United States' claims for decrees for reclamation facilities on the Western Slope may obtain a more senior priority date for those projects and provide insulation from abandonment for failure to construct the projects. The United States seeks an earlier date for projects already decreed to its local contracting agencies, and it also claims that the United States is not subject to abandonment for nonuse of a water right.

The extent to which existing transmountain diversions would be limited by entry of a decree in favor of the United States is not known at this time. With regard to stream flow, the United States has not yet disclosed what amount of water it demands for each stream on the national forest. Also, the zeal with which the Forest Service will assert any newly decreed stream flow is unknowable at this time. Some transmountain projects already provide for release of waters on the Western Slope to sustain stream life. Whether the United States' claims would affect those projects is also unknown.

The legal issues involved in the United States' claims for Colorado waters present considerations which may reach the United States Supreme Court. The Review Draft of the National Water Commission, apparently conceding the United States' legal position, proposes a number of legislative solutions to problems arising from the federal claims for reserved rights, including the recommendation that if the United States divests prior appropriators under state law, then the United States should pay compensation. Whether any such legislative relief will be forthcoming is uncertain. Federal officials generally regard compensation for water rights perfected under state law as a giveaway.

The United States claims for stream flows are not limited to forest lands, but also include BLM lands located below the national forests. If the United States obtains decrees for its claims and calls for water to satisfy the decrees, some of the environmental objectives¹⁵⁵ asserted in the National Water Commission Review Draft will be served. The end served may be commendable, but the means, at least in the view of the National Water Commission, seem questionable, for it involves divesting property rights heretofore enjoyed.

IV. WHAT EFFECT CAN THE STATE HAVE ON FUTURE WATER USES?

A. *Can the State Constitutionally Affect the Present Place or Nature of Use of Existing Water Rights?*

In considering ways in which the state might have some impact on future use of waters, a fundamental question is the effect the state can have on the present place or nature of use of existing water rights without violating the state constitution. The Colorado constitution presents the general prohibition of a taking or damaging of private property without just compensation¹⁵⁶ and the specific protection of water rights under the system of prior appropriation.¹⁵⁷

The system of prior appropriation is enshrined in concrete in sections 5 and 6, article XVI, of the Colorado constitution. In addition, the case law in Colorado is emphatic in its treatment of water rights as property rights which are entitled to the constitutional protection of property. The sanctity of the property right in water has become a paramount principle in Colorado water law, as evidenced by the legal treatment of changes in water rights, where the rule is firmly established that a change in the exercise of a water right will be permitted unless it adversely affects the vested water rights of any other appropriators.

The one conceded general area of state authority over property rights in water is authority to halt or limit wasteful uses of water.¹⁵⁸ For example, an appropriator may be limited from wasting water by excessive irrigation practices.¹⁵⁹ The

¹⁵⁵ NWC 7-115 to -116.

¹⁵⁶ COLO. CONST. art. II, § 15, should be considered along with the prohibition against taking of private property embodied in the fifth amendment and made applicable to the states by virtue of the fourteenth amendment of the United States Constitution.

¹⁵⁷ COLO. CONST. art. XVI, §§ 5, 6.

¹⁵⁸ COLO. REV. STAT. ANN. § 148-21-35 (Supp. 1969), as amended, COLO. REV. STAT. ANN. § 148-21-35(7) (Supp. 1971). The general proposition is that an appropriator is not entitled to waste water.

¹⁵⁹ See *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961); *Fort Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 P. 37 (1905).

consequences of a firmer regulation of use of water are to make more water available to junior appropriators, and, if the juniors are satisfied, to make waters available for new appropriations.

Waste of water is not strictly policed in Colorado. Decrees previously entered have often awarded quantities of water for a particular use that are excessive for actual needs. The curtailment of excessive diversions is, however, a thorny political problem. Frequently cited examples of alleged "excessive" diversions are those made by certain senior decree holders on the Western Slope, who to some degree attempt to assure that transmountain diversions will not benefit by any failure to utilize old Western Slope decrees to the fullest. No doubt these irrigators think Denverites waste water on lawns.

To propose any action involving state interference with the present mode of exercise of existing water rights, other than regulation of wasteful uses, is to directly confront the time honored concepts of the "sacred" or "inviolable" nature of property rights. A strong argument can be made that affecting the present place or nature of use of existing water rights would also be an impermissible denial of the "right to divert the unappropriated waters of any natural stream to beneficial uses," as guaranteed by the constitution. The argument is that the right to divert unappropriated waters includes the right to continue diverting, once an appropriation is made. This is really a variant of the "sacred" property right theory. To impose regulation on an existing use, and thereby force cessation or change of such use, would be such an interference as to amount to a denial of that water right. The constitutional right to divert means more than just protecting an initial diversion, but properly interpreted, this proviso does not prohibit otherwise constitutional regulation of property rights in water.

The primary constraint on state action remains the property right in water. Any system attempting to affect the present uses of water rights must withstand allegations that it amounts to an unconstitutional taking or damaging of property without compensation, based on federal and state constitutional provisions.¹⁶⁰ There is no doubt that state regulation and especially unreasonable state regulation or limitation of those water rights *can* amount to a "taking" or "damaging" of property. To affect an existing water right in such a way that no reasonable use for it remains would amount to an unconstitutional taking of property without compensation.

¹⁶⁰ U.S. CONST. amend. XIV; COLO. CONST. art. II, § 15.

One approach to achieving control over uses of existing water rights would be to treat existing uses in the way that nonconforming uses are treated in zoning law. In this way, undesirable existing uses might be phased out over a period of time without the necessity of payment of compensation arising. Although the law is not uniform in all the states, there is a growing tendency in zoning law to approve mandatory phase-outs of nonconforming uses after a reasonable period of time. Uses of property existing at the time of the enactment of a zoning law may therefore be required to be changed, after a reasonable period of time in which to permit the owner to amortize his investment. In some jurisdictions it is held that as long as the zoning plan is reasonably related to the public interest and the phase-out period is of reasonable duration, the nonconforming user has no recourse and must change his use without compensation. It appears that Colorado is tending toward acceptance of this majority view.¹⁶¹

One can argue that if the property right in land may be so affected by zoning ordinances, the property right in water should be susceptible to similar control under state law. Thus, the holder of a water right who is putting such right to a use contrary to that deemed to be in the best interests of the state might be given a certain period of years in which to cease such use or convert to another use. As in zoning of land, that period would give him sufficient time to amortize his investment in the water right. If the zoning analogy will hold, one might argue that such a phasing-out program would not conflict with the constitutional provisions prohibiting the taking or damaging of property.

There are, however, peculiar features of the property right in water that lead to the conclusion that the zoning of land analogy is not likely to carry over to phasing-out of water uses. First, the ability of a nonconforming water user to find other reasonable use for his property right is very limited by the principle that no change can be allowed which would injuriously affect the rights of others. Under this principle, it is quite possible that a water user curtailed by the state could not obtain a change since any change would injure other private rights. This kind of dilemma would lead courts to treat manda-

¹⁶¹ See *Art Neon Co. v. City & County of Denver*, 000 F. Supp. 000 (D. Colo. 1973) where the federal district court held Denver's sign code amortization scheme unconstitutional. That opinion indicates that the amortization schedule must be related to economic realities and cannot be so arbitrary as to amount to a taking without just compensation.

tory phase-outs as a "taking." Further, requiring a change in use might well be held to be a taking without compensation even if such other uses were reasonable uses for the reason that changes in use require legal proceedings and substantial expense.

Second, imposition of a phase-out on nonconforming uses may infringe the specific water law provisions of the Colorado constitution. One can argue that the right to divert should be on the same level as the right to hold property in general and therefore susceptible to phasing-out requirements; however, by virtue of the provision guaranteeing the right to divert, water rights may have a special insulated status.

More troublesome are the preference provisions of the Colorado constitution. In light of the preferences, it may be beyond the state's power to divest a preferred domestic user. For example, a state attempt to force a change in use from domestic to agricultural would appear inconsistent with the constitutional preference. (The same problems with respect to the constitutional preferences would arise in attempts to limit changes in present uses from less favored uses to domestic uses.)

The conclusions are that, except for curtailing waste and nonbeneficial uses, there is little practical prospect for affecting the present place or nature of use of existing water rights without the payment of compensation; that phasing out nonconforming uses in water is not a promising approach; and that the preference system poses a possible obstacle even to condemnation. In view of the constitutional and practical problems that are presented, if an effort to affect existing uses is contemplated, it should be a supplementary and severable portion of any overall water use legislation. The effect of the preference for domestic uses as a restraint of the state's ability to acquire water rights by condemnation is not susceptible of a firm answer. Questions of "dominant" eminent domain whereby overwhelming public necessity displaces an existing public right¹⁶² have not, in the reported cases, confronted a preference system.

B. *Regulation of Changes in Water Rights*

One possible approach to asserting state interest in future water use patterns is to regulate changes from existing uses

¹⁶² *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941) (federal government has power to condemn property of a state or one of its subdivisions); *Welch v. City & County of Denver*, 141 Colo. 587, 349 P.2d 352 (1960) (land held for a public use may be condemned for another public use where such taking is required by public necessity).

that are contrary to what are legislatively determined to be in the best interests of the state. This system would avoid the troublesome prospect of attempting to force changes in the existing use of water rights. Rather, it would seek to regulate those changes in use that appropriators themselves propose to make. This approach would not permit so comprehensive a program of conforming water use in the state to desired patterns, but it could have significant effect on future changes of existing water use patterns.¹⁶³ It is not unlike the concept of zoning or planning land use, where the plan is generally structured around the existing patterns of land use at the time the zoning law is enacted, in conjunction with the desired future pattern of land use. Starting with the existing pattern of water use, and regulating the manner in which that pattern is changed in the future, it would be possible for the state to guide the development of new water use patterns along lines that it determined would be in the best interests of the people of the state.

The obstacle with respect to initiating a system of regulating changes in water rights according to a state plan is the certainty of constitutional challenge. This question of constitutionality cannot be definitively answered, because the Colorado Supreme Court has never been faced with the issue. An examination of specific Colorado constitutional provisions, as well as the general nature of the "right" to change water rights, however, may bring the answer nearer.

As related elsewhere in this article, the right to make changes in the exercise of water rights has traditionally been recognized as an integral part of the water rights themselves. Court decisions have spoken in terms of the right to change being an inherent property right existing as an incident of the water right itself.¹⁶⁴ Despite being cast in such sweeping terms

¹⁶³ There probably are significant limits even to this approach. For example, decrees held by water conservancy districts such as Southeastern Colorado Water Conservancy District are for a multiplicity of uses over the entire district with the district board claiming the right under its decrees to allocate its water to these various uses on an annual basis with no application to the courts for a change in use. The United States is the owner of the Colorado-Big Thompson Project water as trustee for reclamation beneficiaries. Northern Colorado Water Conservancy District made permanent allocations of all its water to users by 1955. Changes in uses of project water are not submitted to the water court. The district takes the position that it has the authority to approve such changes. We have not had time to determine whether users of project water could realistically be required to submit to state proceedings. Perhaps the boards of these districts would be amenable to make their change procedures conform to a state plan. However, a conservancy district's duty, pursuant to the federal law by which its project was constructed to make reallocations of water for municipal purposes, probably would supersede any state laws.

¹⁶⁴ *Brighton Ditch Co. v. City of Englewood*, 124 Colo. 366, 237 P.2d 116 (1951).

as an inviolable or "sacred"¹⁶⁵ property right, the right to make changes in water rights has in fact been subject to strict limitation in Colorado. The basis for such limitation has been the doctrine that no change may be made that would have an injurious effect on the vested water rights of any other appropriator. The vested rights of appropriators, no matter how junior or senior, have always been afforded absolute protection against any change in another water right that would cause them any harm. The right to change is now subordinated to the right of other appropriators to maintain the existing benefits of their water rights as presently used, regardless of priority. In other words, a prior appropriator really has a priority over other appropriators only with respect to the present manner of use of his water right. His water right does not necessarily carry with it the right, as against other appropriators, to make changes in the exercise of the water right, even if no greater quantity of water is consumed thereby.¹⁶⁶ In this sense, despite the sweeping language about property rights, the right to change a water right does not have the same dignity as the right to maintain and preserve a water right in its existing form. The courts have totally forbidden a senior appropriator from exercising his right to change if such exercise would have any injurious effect which cannot be adequately mitigated by imposing conditions on the change.

To date, the limitation on changes has been on the narrow basis of the effect on other private rights. No reported case indicates that the change may be denied on the basis of its effect on the public's property right in water. Any new program to this end must be tested against several constitutional principles.

The first such consideration is the prohibition, in both the Colorado and United States Constitutions, against taking property without just compensation.¹⁶⁷ The issue is whether state regulation or curtailment of the right to make changes in water rights constitutes a taking or damaging of property. The argument of a "taking" would be founded on the theory that the right to make changes in the use of private property is a constitutionally protected right, and that any limitation of that

¹⁶⁵ *Strickler v. City of Colorado Springs*, 16 Colo. 61, 71, 26 P. 313, 316 (1891).

¹⁶⁶ *See, e.g., Handy Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 515, 62 P. 847 (1900).

¹⁶⁷ The federal prohibition of such takings is embodied in the fifth and fourteenth amendments. The applicable provision of the Colorado constitution is art. II, § 15, which states that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation."

right constitutes a violation of the constitution. A variation of that argument might be that while the right to make changes is not expressly awarded in the constitution, it is an essential part of the water right itself, and therefore is not susceptible to limitation. These arguments are considerably weakened by the fact that the right to make changes in water rights is not now in fact an absolute property right.

It is possible to construct a system of regulation of changes in water rights, reasonable and in accordance with clear legislative guidelines, which does not amount to an unconstitutional taking or damaging of property. Setting aside for the moment the sections of the Colorado constitution dealing specifically with water rights, the analogy of regulating water rights to clearly constitutional regulation of property uses arising from zoning and land planning holds promise. Property rights in land are subject to very significant limitations in use under zoning laws, yet such laws, if they are a reasonable exercise of the police power, are upheld against constitutional attack.¹⁶⁸ There is no necessary reason to exalt water rights above other kinds of property rights. Water rights should logically be susceptible of the same type and degree of regulation as are other property rights. Moreover, the right to change an existing water right should, if anything, be accorded less dignity than the right to maintain existing use. Imposing restrictions on what types of changes may be made in a water right still leaves untouched the existing use of that water right, and in this sense can be considered neither a taking nor a damaging. It is commonplace for property rights in land to be limited in this manner by zoning laws. As long as the regulatory scheme is reasonable and not arbitrary, and as long as it permits continued use along present patterns, the regulation of changes in use would appear to be no more unconstitutional, in terms of being a taking or damaging of property without compensation, than are the restrictions imposed by zoning laws. The courts have developed a body of law with respect to zoning that illustrates how the constitutional problems are dealt with.

Returning to the doctrine of prior appropriation, as contained in article XVI, sections 5 and 6, it may be argued that it necessarily carries with it the right to put water to whatever use the owner sees fit whenever he sees fit. This argument depends on an exaltation of the property right in water to a unique, insulated and forever unassailable position. It is be-

¹⁶⁸ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

lieved that there are no property rights so utterly beyond state control. Under a strictly literal interpretation of the constitutional language in sections 5 and 6, regulation of changes in water rights would not appear to be unconstitutional. However, the right to a change was not derived from those sections by the supreme court; it was derived from the property right.¹⁶⁹ Regulation of changes in the use of water rights would therefore seem to be a permissible exercise of the police power of the state, not in fatal conflict with the doctrine of prior appropriation. One should note that special care would be necessary in drafting a statute so that an unwitting taking did not occur. Specific changes have heretofore been utterly denied when no conditions would protect other rights; however, a state prohibition of the *only* available change might be another matter.

The third constitutional consideration is the preference doctrine:

Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.¹⁷⁰

The preference provision presents at least a theoretical obstacle to a legislative system regulating changes in water rights. The preference language may provide such large holes for preferred users that the system could be rendered ultimately ineffectual.

The logical consequence of the preference provision is to permit all water to be acquired for domestic purposes, regardless of any statutory regulation to the contrary. For example, if, under a regulatory system, a water right used for agricultural purposes were prevented, pursuant to an otherwise constitutional regulation, from being changed to domestic use, the prospective domestic user could probably be expected to assert a constitutional right, arising from the preference, to use that water right for domestic purposes, and to seek to condemn the right if necessary. If this invocation of the preference were sustained against exercise of the state interest in defeating the change in use, the regulatory system may then suffer from a flaw of considerable proportions, namely an inability to constrain conversions of agricultural water rights to domestic pur-

¹⁶⁹ Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

¹⁷⁰ COLO. CONST. art. XVI, § 6.

poses in those cases where the change was unwanted in terms of the state plan. In view of the probable goals of any water use plan in Colorado at this time, the purpose of the plan might be defeated by this application of the preference. A discussion of systems to regulate changes in water rights should therefore be considered in light of this contingent constitutional problem.

There are a number of approaches for asserting the state's interest with respect to changes in water rights. The possibilities range from completely overhauling the existing legal and constitutional framework and substituting an entirely new system of state administrative regulation, at one extreme, to merely attempting to increase the state's role in water proceedings within the existing judicial system at the other.

A purely administrative system for all changes in water rights might be desirable because of the degree of direct control it would afford the state over such changes. This type of system, however, would be a major departure from the judicial system of water rights determinations that has traditionally existed and still exists in Colorado. If changes were to be handled administratively, then perhaps other water matters should be so treated.

It is possible, however, to construct a system for changes of water rights utilizing an administrative authority to which applications for changes in water rights are submitted as a prerequisite to obtaining the traditional judicial decree for such changes. The administrative authority would be charged with evaluating applications in the light of the public interest, as specifically defined by the legislature. The legislature would have to promulgate comprehensive guidelines and standards on which the administrative authority would base its determinations. For example, the proposed change might be required to conform to a comprehensive state plan for water use and growth. The administrative authority would have to be given flexibility in changing the requirements where the public interest demanded it. It does not seem likely that the state would wish to say that, as an absolute matter, this water shall forever be applied to irrigation of crops on a specific tract. The legislature might spell out the types of situations in which the public interest might demand different results. Once administrative approval were obtained, the change might then be processed judicially as under present law, and the factors presently considered in such proceedings, such as injury to vested rights of others, would be considered by the referee or judge. A

decree permitting the change would then issue.

An administrative approval system coupled with a judicial proceeding, while not a total abandonment of the present system of water rights administration, would still be a significant departure from that system. The effect of such a system could be as great as that of a completely administrative system, in the sense that denial of administrative approval¹⁷¹ would prevent the proposed change. It is likely that opposition to the dual type of system would be nearly as great as to a purely administrative system.

Consideration might also be given to legislation that would continue the water court's primary role in changes, so that the ultimate decision to grant or deny a change in water rights would remain a judicial question. Although the state would not thereby gain direct, absolute control over changes in water rights, legislation could charge the judge or referee to render decisions in accordance with new standards of public interest in addition to considerations of injury that have traditionally controlled such proceedings. Something more than a broad requirement that decisions be in accord with the public interest would appear necessary. Legislative standards would have to be both comprehensive and specific enough to give concrete guidance in deciding individual cases.¹⁷² This specificity will also prevent each judge's or referee's subjective concept of the public interest from determining the future course of water development in the state. This is easier said than done.

Regardless of the specificity of legislative standards, however, it is unrealistic and unfair in an adversary legal system to expect that the judges and referees will consistently render decisions in accordance with the "public interest" if the only persons asserting positions in such proceedings are the proponents of change and other private parties seeking to serve their own interests. If the ultimate determination of issues is left to the water court, then consideration also ought to be given to allowing a state agency to take an active role in water rights proceedings, to present to the judge or referee the state's position on the proposed change in light of the public interest and legislative standards, and to urge the rendering of a decision that would best serve that interest.

The legislature could create a state agency or charge an

¹⁷¹ Presumably the decision of the administrative authority would be subject to judicial review just as other administrative determinations are. It is common to limit the scope of that review.

¹⁷² See CLYDE, *supra* note 111, at 64-69.

existing authority with the function of monitoring all water proceedings wherein the legislative standards for water use in the public interest or a comprehensive state water use plan indicated that the proposed change should be denied.

As has been suggested elsewhere in this article, perhaps the state can intervene in water proceedings, including changes, even under present law, since the 1969 Act permits "any person" to file protests to claims¹⁷³ and permits "all persons interested" to participate in hearings before water judges.¹⁷⁴ Present law, however, does not afford adequate basis in opposing changes for state intervention to have a substantial effect on conforming changes to planning guidelines or to a state water plan or land use plan. Alterations in the statutes to permit expanded grounds for opposing changes would therefore be necessary.

The state agency need not intervene in every change proceeding. Rather, it could evaluate each pending change in light of conformity to or effect on a state plan for water use development approved by the legislature. The agency, through an adequate legal staff, could then enter its appearance in those proceedings where proposed change would be inconsistent with the legislative plan. The agency could participate in the proceeding before the referee or judge in the same manner as other interested parties and be given full opportunity to present its case opposing the change or urging limitation on the change. A decision would then be rendered accordingly, which presumably would strike the proper balance between the state interest and private rights.

Consideration might also be given to eliminating the potential dual proceedings, before referee and water judge, which may occur under the present statute, at least with respect to cases in which the state agency would participate. It would seem better, in cases in which the new state agency was to participate, to have just one proceeding that would determine whether or not the change should be permitted (except for appellate review).

It is beyond the scope of this article to attempt to suggest the types of legislative standards or the nature of a water use plan to be used in this program. The requisite legislative guidelines could take either the form of a comprehensive set of

¹⁷³ COLO. REV. STAT. ANN. §§ 148-21-18(1), 148-21-20(2) (Supp. 1969), as amended, COLO. REV. STAT. ANN. §§ 148-21-18(1)(b), 148-21-20(2) (Supp. 1971).

¹⁷⁴ COLO. REV. STAT. ANN. § 148-21-20(3) (Supp. 1969), as amended, COLO. REV. STAT. ANN. § 148-21-20(3) (Supp. 1971).

objective standards, to be applied in change proceedings to the particular facts involved, or that of a comprehensive state water use plan, delineating the future patterns of use desired (and determined to be "beneficial") in the various regions of the state. The substantive details of either manner of legislative declaration must be the result of major policy decisions, integrated into a workable plan for implementation. The important point, from a legal standpoint, is that the legislative plan be comprehensive enough to permit assertion of the state's interest in all cases of changes of water rights throughout the state, yet flexible enough to meet the exigencies of individual cases. Finally, the policies to be served must be clearly and reasonably related to the welfare of the people of the state in order to be a proper exercise of the police power.¹⁷⁵

¹⁷⁵ See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).